Supreme Court, U. S.
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In the Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,

Petitioner,

vs.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

STANLEY G. FELDMAN
MILLER, PITT & FELDMAN, P.C.
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

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No. .....

ELIZABETH M. LEWIS,
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vs.

TUCSON SCHOOL DISTRICT NO. 1
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Petitioner, ELIZABETH M. LEWIS, requests that a Writ of Certiorari issue to review the denial by the Arizona Supreme Court of Petitioner's Petition for Review from the judgment of the Court of Appeals.

REPORTS OF OPINIONS

The opinion of the Arizona Court of Appeals is reported at 23 Ariz. App. 154 and 531 P.2d 199. The Supreme Court's denial of the Petition for Review is not reported. The opinion of the Court of Appeals and the order by the Arizona Supreme

Court denying the Petition for Review are set forth in Appendix "E" and Appendix "F" respectively.

JURISDICTION

The judgment of the Arizona Court of Appeals, the intermediate appellate court in the State of Arizona, was entered on January 29, 1975, and the Petition for Rehearing was denied on March 4, 1975. The Supreme Court of Arizona denied the Petition for Review on April 8, 1975. Under relevant Arizona law the judgment became final upon the Arizona Supreme Court's denial of the Petition for Review. Jurisdiction in this Court is invoked under 62 Stat. 929, 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Has Respondent, TUCSON SCHOOL DISTRICT NO. 1, violated the equal protection clause of the United States Constitution by setting a standard for retention in employment of public school teachers under Arizona Revised Statute § 15-1471 which in effect prevents Petitioner from being retained in employment after the age of sixty-five (65), while all other State employees, including educators, are evaluated under a different standard which easily permits retention?

2. Has TUCSON SCHOOL DISTRICT NO. 1 violated the equal protection and the due process clauses of the United States Constitution by setting a standard for retention which is so much more burdensome than that required for retention of any other state employee that it, in fact, permits the school board to arbitrarily exercise its own discretion in determining qualification for retention after the age of sixty-five (65)?

STATUTES INVOLVED

The statutory and constitutional provisions involved are Arizona Revised Statutes Sec. 15-1471, 38-745, 38-759, and the equal protection and due process clauses of the United States Constitution. The relevant sections are appended to this Brief as Appendix "A".

STATEMENT OF THE CASE

This suit originated as a special action[1] in the Superior Court of the State of Arizona, in which Petitioner claimed that A.R.S. § 15-1471, as applied to her, violated both the Equal Protection and Due Process clauses of the State and Federal constitutions. This Petition is set forth in Appendix "B" to this Brief.

On June 6, 1973, Petitioner, MRS. ELIZABETH LEWIS, filed a special action against Respondent, TUCSON SCHOOL DISTRICT 1, claiming that she had attained the age of sixty-five (65) in the 1972-73 school year, and had properly made application to the Respondent in accordance with its procedure for retention of employment under A.R.S. § 15-1471 to renew her teachers' employment contract, but that Respondent had summarily denied approval of her application. The court ruled that the Petitioner, as a tenured and continuing teacher, had a right under A.R.S. § 15-1471 to have her application individually considered on its own merits and that Respondent had failed to so consider the application. Accordingly, Respondent was ordered to meet at its earliest convenience to exercise its duty of considering Petitioner's application.

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1. Special action is a procedural form unique to Arizona, which combines the traditional Writs of Certiorari, Mandamus, and Prohibition into one proceeding. See Rules of Procedure for Special Actions, Vol. 17A, Arizona Revised Statutes.

On November 5, 1973, the Board met in closed, informal session with Petitioner and her attorney. Respondent, although previously requested to do so by Petitioner, failed to furnish Petitioner with any indication of the criteria upon which a decision would be based. Respondent did accept oral and written evidence from Petitioner, but permitted no other person except Petitioner's attorney to speak in her behalf.

The evidence submitted to the Board clearly demonstrated that Petitioner was physically and mentally competent to continue teaching, that she had a distinguished and unique educational background which included thirty-nine (39) years of service to her students. Her principal, Clarence Logan, evaluated her teaching abilities in the course of her regular duties, as "excellent", and recommended her continued employment on the basis that she is "one of the finest teachers one could find anywhere".

On December 18, 1972, the Board denied her application for retention on the grounds that termination of her services would not "prove injurious to students", and that MRS. LEWIS, a junior high school English teacher, would not be "difficult to replace". The board had heard no evidence on either issue.

Petitioner then brought this action in the Arizona Superior Court, alleging that the Board's interpretation of A.R.S. § 15-1471 violated the Equal Protection clause of the United States Constitution. This Petition for Special Action is appended to this Brief in Appendix "C". In addition, MRS. LEWIS claimed that her due process rights had been violated since the school board had set a standard for retention which was not only unreasonable, but of which she was ignorant at the time she was given her hearing. The Superior Court and the Court of Appeals upheld the acts of Respondent and the Supreme Court of Arizona declined to review their holding. The

Order of the Superior Court denying Petitioner's claim is set forth in Appendix "D".

REASONS FOR GRANTING CERTIORARI

The use of age ceilings for public employment are not, per se, prohibited by the equal protection clause. *E.g., Weiss v. Walsh*, 324 F. Supp. 75 (D.C.N.Y. 1971). However, in order to justify an otherwise impermissible regulation of constitutional rights, the State must prove that it has either a rational basis or compelling, state interest to justify its actions. This Court recently accepted review of the case of *Massachusetts Board of Retirement v. Murguia* (43 U.S.L.W. 3609, May 20, 1975), in order to determine the constitutionality of a Massachusetts statute mandating the retirement of state police officers upon reaching the age of fifty (50). The District Court in that case held that such a statute was unconstitutional, albeit perhaps permissible had an older age been specified as the cut-off. However, the Court stated there was no rational basis for the presumption that a police officer becomes incapable of performing his job at the age of fifty (50).

This action raises a closely related problem, namely, can the State set a standard for retention after the age of sixty-five (65) for one sub-class of state employees different than that maintained for all other members of that class? Further, can the state impose a standard for retention unrelated to its avowed rational basis in requiring an earlier retirement age?

The issue of fundamental constitutional law which Petitioner advanced in her case goes beyond a mere holding that the State may set different retirement ages for different types of employees. This is not a mandatory retirement age case; it is a retention case questioning the validity of different standards for retention and continuation of employment after non-mandatory retirement age has been reached. Petitioner

claimed throughout her arguments in the court below that it violated a constitutional requirement of equal protection of the law to condition continuation of her employment beyond the age of sixty-five (65) upon proof of an "irreparable injury", when other State employees, including teachers in State institutions, were required to show only "valuable service" or "special fitness" in order to obtain their employer's approval to continue working past the mandatory retirement age.

Arizona Revised Statute § 15-1471 holds out the promise to all public school teachers that they may continue teaching past the age of sixty-five (65), upon approval of their school board.

This is a promise also held out to the employees of institutions under the control of the Arizona Board of Regents, as well as all other state employees, including elementary and secondary educators at the various state institutions. **Arizona Revised Statutes** § 39-759. Furthermore, a new statutory system, effective July 1, 1975, permits every other State employee to continue in employment after retirement age if "specially fitted" by training to perform the duties of his position. **Arizona Revised Statutes** § 38-759.01 (B).

The State thus treats public school teachers such as Petitioner differently from all other State employees, including numerous teachers at state-operated schools such as colleges, junior colleges, schools for the retarded, the delinquent, the deaf, the blind, and those in need of rehabilitation.

This distinction is not merely academic to Petitioner. She can prove "special fitness"; in fact, the Respondent school board has admitted her qualifications. She cannot prove she is irreplaceable." "Irreparable injury to her students" is an equally illusory standard. The result is that Petitioner's attempt at retention has failed because the Respondent, an agency of the State, has applied to Petitioner's sub-class of State employees a

standard more rigid than that applied to any other state employee seeking retention.

Of course, Respondent could argue (and it did below) that the duties of a public school teacher are more onerous than those of most other State employees and that therefore Respondent could validly and constitutionally discriminate by requiring Petitioner to show she still retains mental and physical ability to perform the demanding duties required of a junior high school English teacher. Assuming, arguendo, that this argument is valid and that Petitioner can be required to meet this increased burden – even though a teacher at the state school for retarded children need not make such a showing in order to be retained – it would still violate the fundamental concepts of equal protection and due process to require, as did Respondent, that Petitioner show not only special fitness and mental and physical ability (all of which she can demonstrate) but also irreplaceability – a criterion which cannot be demonstrated even by the President of the United States.

EQUAL PROTECTION

The Equal Protection clause of the 14th amendment of the Constitution of the United States prohibits classifications and distinctions which are arbitrary and capricious and bear no reasonable relation to the purpose of the law. When a "fundamental right" or a "suspect category" is involved, the burden upon the State is much stricter, and it must demonstrate a compelling State interest in order to uphold its regulation. *E.g., Shapiro v. Thompson,* 394 U.S. 618 (1969) (right to travel); *Cleveland Board of Education v. La Fleur* 94 S. Ct. 791 (1974) (sex); *Levy v. Louisiana* 391 U.S. 68 (1968) (legitimacy of birth).

Throughout all argument in this suit, the only possible rationale claimed by the State for providing different retirement

ages for educators was that teaching at the elementary or secondary level was more demanding, both physically and intellectually, than teaching at the college level, and that teaching *per se* was a more demanding profession than that of any other state employee.

However, throughout these proceedings, Petitioner has shown that she meets all standards set up by the State to test the competence and capabilities of its employees. Indeed, the SCHOOL DISTRICT itself admitted that MRS. LEWIS is both physically and mentally competent to perform her job. However, the standard which the Board has set for retention bears no relationship at all to the only avowed rational basis for permitting any distinction between the two classes.

Thus, the question presented is whether a governmental body can defend unequal statutory treatment of the same class of persons (state employees who are presently paying funds into the State Retirement Fund who have reached the age of sixty-five (65)) by aserting that there is a rational basis for such a difference (education at the elementary and secondary level is more demanding) and then be permitted to procede to set a standard for retention which bears no relationship to the rational basis which initially permitted the State to make such a distinction. It is Petitioner's position that although it may be consititutional to set a different baseline cut-off for retirement, since retention is expressly permitted by statute any test or standard set up by the individual school district for retention of its employees must be related to said rational basis, and must be justifiable in itself. Absent any other interpretation, A.R.S. § 15-1471 is unconstitutional.

The actions of the TUCSON SCHOOL DISTRICT NO. 1 in setting up a standard which is different from that applied to any other type of state employee is without rational basis, and effectively eliminates a right which every other state employee

has: the right to continue working for so long as the employee can continue to meet a reasonable standard of retention which, is the case of every other employee, is related to his ability to perform his job.

If the State of Arizona holds out to its employees the statutory promise of continued employment beyond retirement, that promise cannot be hedged about with restrictions which destroy the right. This position is convincingly stated in *Goss v. Lopez,* U.S. 43 U.S.L.W. 4181, Jan. 21, 1975, in which the Court held that the suspension of public school students without a hearing violated the Fourth Amendment. This holding was based on the principle that once a statutory right is created, a state administrative agency may not abridge that right without affording the beneficiary due process and equal protection under the law. Thus, the Court stated:

> "Accordingly, a State employee who under state law, or rules promulgated by stated officials, has a legitimate claim of entitlement to continue employment absent sufficient cause for discharge, may demand the procedural protections of due process [citations omitted]."

In the same vein, on the basis of Arizona law, MRS. LEWIS plainly had a legitimate claim of entitlement to continue to teach. Having chosen to extend the right to continue working to all State employees generally, Arizona may not restrict that right by setting a standard so different from every other standard applied to State employees as to withdraw that right or to make it impossible to continue working.

This principle is also expressed in *Application of Levine,* 97 Ariz. 88, 90-91, 397 P.2d 205 (1964), where the Court stated;

> "The right to practice law is neither greater nor less than the right to engage in other occupations, businesses or trades, for the right to seek *and retain* [emphasis added]

> employment is shared by all equally and to be equal must be upon the same conditions. It cannot be treated as a matter of grace or favor.

Defendant's act in setting down a standard requiring Plaintiff to demonstrate irreparable injury is unreasonable as a matter of law. The Arizona Teacher's Retirement Act never contemplated that its provisions would used by employers to prevent those who reach retirement age from remaining employed as teachers. The Act was enacted for the benefit of the members of the teaching profession, and its intention was to reward teachers for their years of service. The Act evidences no legislative intention to give employers any independent power other than to administer the provisions of the plan to the Retirement Board. *Montgomery v. Crawford,* 70 Ariz. 359, 220 P.2d 853 (1950).

A.R.S. § 15-1471 expressly holds that age seventy (70), not sixty-five (65), is the compulsory age of retirement. *Finch v. Department of Public Welfare,* 80 Ariz. 226, 295 P.2d 846 (1956). The Board may not make use of its power as a subterfuge to avoid the Teacher's Retirement Act by setting standards of retention which are so burdensome and inappropriate as to force retirement. *Cf. Tucson High School District No. 1 v. Williams,* 1 Ariz. App. 389, 404 P.2d 324 (1965).

DUE PROCESS

To set a standard of retention requiring a teacher to be so exceptional that no other teacher could be an adequate substitute is not a standard of retention at all. A standard which is so high that no reasonably competent person could satisfy it is by definition unreasonable and arbitrary. Such a standard is not only prohibited by the Teacher's Retirement Act, but is

incompatible with the due process clause of the Constitution of the United States.

It is a basic precept of constitutional law that when a statute does not prescribe a specific standard the Court should insure the standard of reasonableness. *New York ex rel Leiberman v. Van de Carr,* 199 U.S. 552.

What may be reasonably implied from the statute in question is that the Board is to give its approval for retention unless, in its honest judgment, reasonably exercised, the applicant is unfit or unsuitable to continue teaching. When the uncontroverted evidence shows that the applicant is not only qualified and can successfully perform the job, but is exceptionally qualified, the refusal to rehire is unreasonable and arbitrary. Thus, the standards imposed by the School Board have no manifest relationship to the employment in question.

One additional argument which Petitioner raised in her appeal to the Arizona Court of Appeals, but which was never discussed in that Court's opinion, is that the classification endorsed by the State in this case deprives her of property rights protected under the Fourteenth Amendment of the Arizona and the United States Constitutions. First, she is deprived of her right to pursue a calling or profession, and thus has lost, as of this date, three full years' salary. Second, by being required to retire at age sixty-five (65), when no other public employees can be compelled to retire until age seventy (70), Petitioner has been deprived of the opportunity to earn additional retirement credits between the ages of sixty-five (65) and seventy (70) to be added to her account in the State Employees Retirement Fund. As a tenured teacher, the right to contribute to such fund was a vested property right. In addition, as a tenured teacher, the right to continue teaching (should all appropriate qualifications be maintained) was a

vested property right. The State's action in prohibiting her from insuring her retirement security through exercise of her vested rights has no constitutionally permissible basis.

CONCLUSION

The vast number of cases in the lower court upholding mandatory retirement ages for stage employees evidences the fact that both medical advances and economic necessity have presented our society with a large class of persons who are no longer content to retire at an arbitrary cut-off age. The fact that this Court has accepted certiorari in the case of *Massachusetts v. Murguia* demonstrates its willingness to speak on this subject. No less important to a delineation of the extent of the power of the state in its regulation of its citizens' right to work is the question of the power of the government to set and administer retention standards in the "grey area" between retirement age and mandatory retirement age. It is an issue which will become only more prevalent in years to come.

It is RESPECTFULLY SUBMITTED that this Petition for a Writ of Certiorari to review the judgment of the Arizona Supreme Court denying the Petition for Review and the judgment on the merits of the Arizona Court of Appeals should be granted.

RESPECTFULLY SUBMITTED this 3rd day of July, 1975.

MILLER, PITT & FELDMAN, P.C.

BY STANLEY G. FELDMAN
111 South Church Ave.
Tucson, Arizona 85701

Attorneys for Petitioner

Appendix A

15 A.R.S. Sec. 1471

Retirement of teacher members

Any teacher in active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of seventy, whether or not they apply to be retained.

38 A.R.S. Sec. 745

Membership in retirement system

A. All employees and officers of the state and instrumentalities of the state and all officers and employees of political subdivisions establishing a retirement system administered by the board pursuant to the provisions of this article who as a result of state service or service for the political subdivision are included in agreements providing for their coverage under the federal old age and survivors insurance system, shall be subject to the provisions of this article and shall be members of the retirement system, except that membership shall not be mandatory on the part of any employee eligible and electing to participate in the optional retirement programs established by the Arizona board of regents pursuant to the authority conferred by § 15-725.02.

B. All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds and who are declared to be state employees and officers by the legislature

for retirement purposes shall, upon such legislative enactment, be subject to the provisions of this article and shall be members of the retirement system. Any members whose service has terminated other than by death shall be deemed to be a member of the retirement system until his contributions made under the provisions of this article have been refunded.

C. A temporary employee whose employment is for a term of not more than three months may have the option of signing a waiver of membership and no contributions shall be deducted from his wages or paid in his behalf by his employer for the period of temporary employment, but if the employment continues beyond the period of three successive months his retirement account shall be established as of the beginning of the next succeeding payroll period following completion of the three month period.

D. Employees and officers shall not become members of the state employees' retirement system and, if members immediately prior thereto, shall have their membership status suspended while employed by state departments paying salaries of their officers and employees wholly or in part from funds received from other sources than appropriations from the general fund for the period or periods payment of the employer contribution is not made by or on behalf of such departments.

As amended Laws 1964, Ch. 142, § 1; Laws 1974, Ch. 125, § 2.

38 A.R.S. Sec. 759

Retirement from service

Text of section effective until July 1, 1975.

A. A member upon attaining age sixty-five may retire from state service and upon application shall receive a life pension payable in equal monthly installments derived from his prior service credit, if any, together with an annuity for life derived from his retirement account. The annuity shall be payable in

equal monthly installments, the amount of which installments shall be determined by the interest and life expectancy tables applicable at the date of commencement of retirement and based upon the attained age of the annuitant at the commencement of retirement. A member who has retired and is receiving benefits pursuant to this subsection whose death occurs prior to receipt of annuity payments in an amount equal to his retirement account balance immediately preceding retirement, shall have paid to his designated beneficiary or his estate in a lump sum the difference between the said retirement account balance and the total amount of annuity payments received.

B. A member upon attaining age sixty-five with creditable service of not less than five years may retire from state service and may, upon application, elect ro receive in lieu of his prior service pension, if any, and the annuity payments from his account provided in subsection A the actuarial equivalent of such retirement benefits under one of the following options:

1. A life income paying a maximum monthly benefit with all benefits ceasing at death.

2. An income for ten years certain and for life thereafter, payable monthly to the retired member in an amount actuarially ascertained to assure one hundred twenty payments to the retired member or to his designated beneficiary or estate.

3. A monthly income during the joint lifetime of the retired member and another person who has been designated in writing to the board at the time of retirement, and upon the death of the retired member or the other person two-thirds of this amount shall be paid during the surviving lifetime.

C. The options provided under subsection B shall be elected at the time the retirement application is made and shall become effective and irrevocable upon payment of the first monthly amount.

D. A member who has attained age sixty with creditable service of not less than five years may retire from state service and upon application receive a life annuity derived from his retirement account and the actuarial equivalent of his prior service pension payable concurrently with such life annuity. The pension and annuity shall be determined and paid in the manner set forth in subsection A of this section.

E. In lieu of the benefits provided in subsection D, such member may, upon application, elect to receive the actuarial equivalent of such retirement benefits under one of the options set forth in subsection B of this section.

F. If a member returns to service after having been retired, his membership shall be reinstated and no further payments shall be made to him until subsequent retirement from service, at which time his retirement benefits shall be computed on the basis of his then attained age and after adjustment for retirement benefits previously received.

G. Notwithstanding anything to the contrary herein, a member who retires from service pursuant to this section and whose total monthly benefits is less than ten dollars, shall be paid in a lump sum the actuarial equivalent of such monthly benefit.

H. All state officers and employees and officers and employees who are declared by law to be subject to the provisions of this article, except elected officials or officers designated by law for a definite or an indefinite term and appointive members of boards and commissions, who have attained or exceeded the age of seventy years on and after July 1, 1954, shall be compulsorily retired and shall not be compensated for state service nor be paid retirement benefits of any kind except as provided by this article. The provisions of this subsection shall likewise apply to officers and employees of political subdivisions of the state, except that the date on which

such retirement shall be compulsory shall be July 1 of the year following the effective date of their employer's retirement system established under the provisions of § 38-752.

I. Employees of institutions under control of the Arizona board of regents who reach the age of seventy, as long as they continue to render valuable service to the institution employing them, may continue to be employed at the discretion of the board of regents. Any other employee, except an employee of a political subdivision whose compensation is provided wholly or in part from state funds who is declared by law after July 3, 1955, to be a state employee for retirement purposes, who has attained age seventy and who is certified by his appointing authority as specially fitted by reason of long experience to perform the duties of his position shall, if he desires, upon request of his appointing authority and approval of the governor, if a state employee, or approval of the governing body of the political subdivision if an employee thereof, be continued in service of such period or periods as may be requested by the appointing authority, but that no term of continued employment shall exceed one year and no more than five such terms may be approved. If employment beyond the age of seventy is extended pursuant to this subsection, no futher contributions shall be made either by the employer or the employee, nor shall such continuing employee be entitled to any change in the benefits as computed at the age of seventy, except in respect of that portion of the benefit derived from his retirement account with interest accruals.

As amended Laws 1957, Ch. 96, § 5; Laws 1958, Ch. 95, § 1; Laws 1970, Ch. 136, § 18.

38 A.R.S. Sec. 759

Retirement from service

Text of section effective July 1, 1975.

A. Except as provided in § 38-759.01, a member upon reaching his normal retirement date shall be retired from state service and upon application shall receive a life pension payable in equal monthly installments derived from his prior service credit, if any, together with an annuity for life derived from his retirement account. The annuity shall be payable in equal monthly installments, the amount of which installments shall be determined by the interest and life expectancy tables applicable at the date of commencement of retirement and based upon the attained age of the annuitant at the commencement of retirement. A member who has retired and is receiving benefits pursuant to this subsection whose death occurs prior to receipt of annuity payments in an amount equal to his retirement account balance immediately preceding retirement, shall have paid to his designated beneficiary or his estate in a lump sum the difference between the said retirement account balance and the total amount of annuity payments received.

B. Except as provided in § 38-759.01, a member upon reaching his normal retirement date shall be retired from state service and may, if he has creditable service of not less than five years and upon application, elect to receive in lieu of his prior service pension, if any, and the annuity payments from his account provided in subsection A of this section the actuarial equivalent of such retirement benefits under one of the following options:

1. A life income paying a maximum monthly benefit with all benefits ceasing at death.

2. An income for ten years certain and for life thereafter, payable monthly to the retired member in an amount actuarially ascertained to assure one hundred

twenty payments to the retired member or to his designated beneficiary or estate.

3. A monthly income during the joint lifetime of the retired member and another person who has been designated in writing to the board at the time of retirement, and upon the death of the retired member or the other person two-thirds of this amount shall be paid during the surviving lifetime.

C. The options provided under subsection B of this section shall be elected at the time the retirement application is made and shall become effective and irrevocable upon payment of the first monthly amount.

D. A member who has attained age sixty with creditable service of not less than five years may retire from state service and upon application receive a life annuity derived from his retirement account and the actuarial equivalent of his prior service pension payable concurrently with such life annuity. The pension and annuity shall be determined and paid in the manner set forth in subsection A of this section.

E. In lieu of the benefits provided in subsection D of this section, such member may, upon application, elect to receive the actuarial equivalent of such retirement benefits under one of the options set forth in subsection B of this section.

F. If a member returns to service after having been retired, his membership shall be reinstated and no further payments shall be made to him until subsequent retirement from service, at which time his retirement benefits shall be recomputed on the basis of his then attained age and after adjustment for retirement benefits previously received.

G. Notwithstanding anything to the contrary herein, a member who retires from service pursuant to this section and whose total monthly benefit is less than ten dollars, shall be paid in a lump sum the actuarial equivalent of such monthly benefit.

H. Except as provided in § 38-759.01, all state officers and employees and officers and employees who are declared by law to be subject to the provisions of this article, except elected officials or officers designated by law for a definite or an indefinite term and appointive members of boards and commissions, who have attained or exceeded their normal retirement date on and after the effective date of this section, shall be retired and shall not be compensated for state service nor be paid retirement benefits of any kind except as provided by this article. The provisions of this subsection shall likewise apply to officers and employees of political subdivisions of the state which have established a retirement system under the provisions of § 38-752.

I. Except for participants covered under § 38-781.31, no contributions shall be made either by a participant or his employer, nor any service credited, after the participant has attained his normal retirement date.

As amended Laws 1957, Ch. 96, § 5; Laws 1958, Ch. 95, § 1; Laws 1970, Ch. 136, § 18; Laws 1974, Ch. 120, § 3, eff. July 1, 1975.

For text of section effective until July 1, 1975, see § 38-759, ante.

38 A.R.S. Sec. 759.01

Employment beyond normal retirement date

A. The personnel board shall adopt rules prescribing the procedures and standards to be followed for the continuation of employment beyond the normal retirement date.

B. Any person employed as an officer or employee of the state or a political subdivision of the state may continue employment beyond the normal retirement date if:

1. Such officer or employee requests in writing, six months prior to his normal retirement date, that he be permitted to continue such employment, and

2. Such officer or employee is certified by his appointing authority as specially fitted by reason of experience and training to perform the duties of his position and the appointing authority approves the request for continued employment, and

3. The personnel board approved such request pursuant to its rules and regulations governing continued employment after the normal retirement date.

C. The personnel board shall not approve a request for a term of continued employment exceeding one year but may approve as many annual requests for continued employment as they deem advisable.

Added Laws 1974, Ch. 120, § 4, eff. July 1, 1975.

Effective July 1, 1975.

Appendix B

In the Superior Court Of the State of Arizona
In and For the County of Pima

No. 142873

ELIZABETH LEWIS,
Plaintiff

vs.

TUCSON SCHOOL DISTRICT NO. 1,
Defendant

Filed June 6 1973

MILLER, PITT & FELDMAN, P.C. Tucson
by Stanley G. Feldman
Attorneys for Plaintiff

COMPLAINT FOR EXTRAORDINARY RELIEF UNDER RULES PERTAINING TO SPECIAL ACTIONS

Plaintiff alleges:

I.

Plaintiff is a resident of Pima County, Arizona; at all times material to this action Plaintiff was an employee of Tucson School District No. 1.

II.

Tucson School District No. 1 is a political subdivision of the State of Arizona.

III.

Plaintiff is a teacher in active service and a member of the State employees' retirement system pursuant to A.R.S. §15-1401 *et. seq.*

IV.

In the school year of 1972-73, Plaintiff attained the age of sixty-five, and made application to be retained in her position as a teacher in accordance with A.R.S. §15-1471.

V.

A.R.S. §15-1471 provides as follows:

> "Any teacher on active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis."

VI.

School District No. 1 has provided forms adopting a procedure so that teachers who reach the age of sixty-five may make application for retention.

VII.

Plaintiff made application for retention using the forms and following the procedure provided by School District No. 1. On September 9, 1972, Plaintiff submitted the form entitled "Appeal for Continued Employment After Sixty-Five". This form included her statement that:

> "I would like to continue work as a contract employee for the 1973-74 school year. I am in good health and will furnish doctor's statement to this effect, if required."

Said form also included a recommendation from Mrs. Lewis' principal, saying:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

VIII.

At a meeting of the Tucson School District No. 1 board on October 26, 1972, Mrs. Lewis' request was denied.

IX.

The denial of Plaintiff's application was not based on consideration of the merits of that application.

X.

Defendant's policy is to routinely deny applications such as Plaintiff's.

XI.

Plaintiff was not notified of the date of the meeting at which her application was to be discussed, nor was she given an opportunity for a hearing at which to present further support for her petition for retention.

XII.

Such actions by the Defendant resulted in a violation of Plaintiff's right to due process of law under the Constitution of the United States and of the State of Arizona.

XIII.

The action of the Defendant resulted in an unreasonable classification of teachers over the age of sixty-five within the State of Arizona, in that all teachers over sixty-five are not treated equally under A.R.S. §15-1471, since many school districts retain teachers over the age of sixty-five.

XIV.

Such classification is without rational basis; such unequal treatment within a given class constitutes a form of discrimination and violates Plaintiff's right to equal protection under the laws as guaranteed by the Constitution of the United States.

XV.

Defendant has failed to exercise the discretion which it has a duty to exercise and has failed to perform a duty required by law by its denial of Mrs. Lewis' application for retention.

XVI.

Defendant's rejection of Plaintiff's application was arbitrary, capricious and an abuse of discretion since Plaintiff was denied the right to have her application considered on its merits, and was also denied her constitutional rights to due process of law and equal protection of law.

XVII.

Plaintiff has no plain, speedy or adequate remedy except by application for extraordinary relief.

WHEREFORE, Plaintiff requests that Defendant be required to rescind the denial of her application; that Defendant be ordered to approve and forward Plaintiff's application for retention to the State Employees' Retirement Board; that Defendant be ordered to tender Plaintiff a contract to continue teaching in her present position for the school year 1973-74, and that Plaintiff be awarded her costs expended herein and such other and further relief as is just and proper in the premises.

MILLER, PITT & FELDMAN, P.C.

By Stanley G. Feldman
Attorneys for Plaintiff

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

ELIZABETH LEWIS, being first duly sworn, upon her oath, deposes and says:

That she is the Plaintiff herein; that she has read the foregoing Complaint and that the contents thereof are true and correct to the best of her knowledge and belief.

/s/ Elizabeth Lewis

Appendix C

In the Superior Court for the State of Arizona
In and For the County of Pima

No. 142873

ELIZABETH M. LEWIS
Plaintiff
vs.
TUCSON SCHOOL DISTRICT NO. 1
Defendant

Filed January 21, 1974

SUPPLEMENTAL COMPLAINT

COUNT ONE

Plaintiff alleges:

I.

Plaintiff is a resident of Pima County, Arizona; at all times material to this action Plaintiff was an employee of Tucson School District No. 1.

II.

Tucson School District No. 1 is a political subdivision of the State of Arizona.

III.

Plaintiff is a teacher in active service and a member of the State employees' retirement system pursuant to A.R.S. § 15-1401 *et. seq.*

IV.

In the school year 1972-73, Plaintiff attained the age of sixty-five and made application to be retained in her position as a teacher in accordance with A.R.S. § 15-1471.

V.

A.R.S. §15-1471 provides as follows:

> "Any teacher on active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis."

VI.

School District No. 1 has provided forms adopting a procedure so that teachers who reach the age of sixty-five may make application for retention.

VII.

Plaintiff made application for retention using the forms and following the procedure provided by School District No. 1. On September 9, 1972, Plaintiff submitted the form entitled "Appeal for Continued Employment After Sixty-Five." This form included her statement that:

> "I would like to continue work as a contract employee for the 1973-1974 school year. I am in good health and will furnish doctor's statement to this effect, if required."

Said form also included a recommendation from Mrs. Lewis' principal, saying:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

VIII.

At a meeting of the Tucson School District No. 1 board on October 26, 1972, Mrs. Lewis' request was denied.

IX.

The denial of Plaintiff's application was not based on consideration of the merits of that application.

X.

Defendant's policy is to routinely deny applications such as Plaintiff's.

XI.

Plaintiff was not notified of the date of the meeting at which her application was to be discussed, nor was she given an opportunity for a hearing at which to present further support for her petition for retention.

XII.

Such actions by the Defendant resulted in a violation of Plaintiff's right to due process of law under the Constitution of the United States and of the State of Arizona.

XIII.

The action of the Defendant resulted in an unreasonable classification of teachers over the age of sixty-five within the State of Arizona, in that all teachers over sixty-five are not treated equally under A.R.S. § 15-1471, since many school districts retain teachers over the age of sixty-five.

XIV.

Such classification is without rational basis; such unequal treatment within a given class constitutes a form of discrimination and violates Plaintiff's right to equal protection under the laws as guaranteed by the Constitution of the United States.

XV.

Defendant has failed to exercise the discretion which it has a duty to exercise and has failed to perform a duty required by law but its denial of Mrs. Lewis' application for retention.

XVI.

Defendant's rejection of Plaintiff's application was arbitrary, capricious and an abuse of discretion since Plaintiff was denied the right to have her application considered on its merits, and was also denied her constitutional rights to due process of law and equal protection of law.

XVII.

Plaintiff has no plain, speedy or adequate remedy except by application for extraordinary relief.

COUNT TWO

I.

Plaintiff incorporates by reference each and every allegation contained in Count One as if fully set forth herein.

II.

Pursuant to the September 25, 1973 Order of this Court in the above captioned case, a copy of which is incorporated by reference as though fully set forth herein, the Defendant board met in closed, informal session with Plaintiff and her attorney on November 15, 1973.

III.

The Board, though requested by Plaintiff, did not furnish Plaintiff with any indication of the criteria upon which their decision would be based, but did agree to permit Plaintiff to furnish material to the Board which she thought important to be considered by the Board.

IV.

At the November 15, 1973, meeting, the Board received and accepted oral and written material from Plaintiff in support of her application for continued employment, but permitted no other person except Plaintiff's attorney to speak in her behalf.

V.

On December 18, 1973, the Board, in its regularly scheduled meeting, announced its decision as follows:

> "The Board of Education has determined not to approve the request of Mrs. Elizabeth Lewis to teach during the 1973-74 school year following her sixty-fifth birthday. The Board does not question her physical and mental fitness. The Board's position is that A.R.S. 15-1406.B provides for the retirement of a teacher 'at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards to the board of trustees (of the retirement system) his application to be retained.' Under the provisions of this statute, the Board of Education may retain an employee on a year-by-year basis between the ages of sixty-five and seventy. If termination of the service of an employee would prove injurious to students, or if the employee would be difficult to replace, the Board of Education would be inclined to approve his request to continue employment. Since neither of these problems exist in this instance, due to the availability of many fine replacements in Mrs. Lewis' field of teaching, and since she could be and was replaced by a very able teacher, the Board of Education does not approve her request to continue."

VI.

The material presented to the Board clearly and convincingly demonstrated that Plaintiff was entitled to have her application for continued employment approved and accepted by the Board.

VII.

The Board's decision to disapprove Plaintiff's request was so patently in disregard of the material submitted to it as to constitute a manifest abuse of discretion.

VIII.

The Board's decision to disapprove Plaintiff's application was based on consideration so invidiously vague and subjective as to constitute an arbitrary abuse of discretion.

IX.

The Board exceeded its jurisdiction and acted without jurisdiction in denying Plaintiff's application on standards and for reasons not authorized by A.R.S. § 15-1471 or A.R.S. § 15-1406.

X.

The Board's decision to disapprove Plaintiff's application and the manner in which the Board came to that decision violates the due process and equal protection clauses of the State and Federal Constitutions.

WHEREFORE, Plaintiff requests that Defendant be required to rescind the denial of her application; that Defendant be order to approve and forward Plaintiff's application for retention to the State Employees' Retirement Board; that Defendant be ordered to tender Plaintiff a contract to continue teaching in her present position for the school year 1973-74, and that Plaintiff be awarded her costs expended herein and such other and further relief as is just and proper in the premises.

MILLER, PITT & FELDMAN, P.C.
Attorneys for Plaintiff

By /s/ JEFFREY H. SCHWARTZ
111 South Church Avenue
Tucson, Arizona 85701

Copy of the foregoing mailed
this 9th day of January, 1974,
to

J. William Brammer, Jr.
DeCONCINI, McDONALD & BRAMMER, P.C.
510 Valley National Building
Tucson, Arizona 85701

Appendix D

In the Superior Court of the State of Arizona
In and For the County of Pima

March 19, 1974

No. 142873

ELIZABETH LEWIS,
Plaintiff
vs.
TUCSON SCHOOL DISTRICT NO. 1
Defendant

JUDGMENT

The matter having heretofore been taken under advisement, IT IS THE JUDGMENT OF THE COURT THAT the Plaintiff is denied the relief sought in the Supplemental Complaint and Defendant is awarded costs.

MARY DEGAGNE,
Deputy Clerk

To –

Miller, Pitt & Feldman, P.C.
111 South Church Avenue
Tucson, Arizona 85701

Deconcini, McDonald & Brammer, P.C.
901 Lawyers Title Building
Tucson, Arizona 85701

Court Administrator

Appendix E

In the Court of Appeals
State of Arizona
Division Two

2 CA – CIV 1698

ELIZABETH M. LEWIS,
Appellant,
vs.
TUCSON SCHOOL DISTRICT NO. 1
Appellee.

Filed Jan. 29, 1975

Appeal from the Superior Court of Pima County
Cause No. 142873

Honorable Richard N. Roylston, Judge
Affirmed

Miller, Pitt & Feldman, P.C. Tucson
By Jeffrey H. Schwartz and Stanley G. Feldman
Attorneys for Appellant

DeConcini, McDonald & Brammer, P.C. Tucson
By J. Wm. Brammer, Jr.
Attorneys for Appellee

Krucker, Judge.

The subject of this appeal is the constitutionality of A.R.S. § 15-1471, which provides:

> "Any teacher in active service who becomes a member of the state employees retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of seventy, whether or not they apply to be retained."

Appellant, a continuing teacher at Townsend Junior High school, Tucson, for 16 successive years, applied to the School Board for renewal of her employment contract in the school year in which she attained the age of 65. Her application was summarily denied and on June 6, 1973, she filed a special action challenging the Board's failure to approve her application; also, that the Board's policy of refusing employment to teachers who reach the age of 65 is unconstitutional.

The lower court directed the School Board to consider appellant's application on its merits, and on November 5, 1973, an informal hearing was held by the Board with appellant and her attorney. It is undisputed that appellant presented evidence to the Board to demonstrate her physical and mental fitness to continue teaching. Enumeration of the evidentiary details is unnecessary – suffice it to say that appellant's reputation in the teaching community was excellent. Her request for retention was accompanied by a letter from the principal of Townsend Junior High School in which he stated:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

The Board, however, on December 18, 1973, denied appellant's application, stating as its reasons:

> "If termination of the service of an employee would prove injurious to students, or if the employee would be difficult to replace, the Board of Education would be inclined to approve his request to continue employment. Since neither of these problems exist in this instance, due to the availability of many fine replacements in Mrs. Lewis' field of teaching, and since she could be and was replaced by a very able teacher, the Board of Education does not approve her request to continue."

The trial court ruled that A.R.S. § 15-1471 did not constitute invidious discrimination on the basis of age in violation of the equal protection clause and therefore rejected appellant's claim that it was unconstitutional.

The major premise upon which appellant's constitutional claim is predicated is the fact that A.R.S. § 38-759 prescribes age seventy as the mandatory retirement age for public officers and employees[1] and that employees under the control of the Board of Regents may continue beyond such age in the Board's discretion. Thus, appellant argues, college professors may teach until age seventy (and even beyond such age at the discretion of the Board of Regents) whereas elementary and secondary school teachers must retire at age 65 (unless the School Board exercises its discretion to continue employment to age seventy).

Appellant concedes that age ceilings for public employment

---

1. A.R.S. § 38-759 was amended in 1974, effective July 1, 1975, and provides for mandatory retirement at age 65 except as provided in A.R.S. § 38-759.01. The latter statute permits continuation of employment beyond age 65 if the officer or employee timely requests continuation of employment, if such officer or employee is certified by his appointing authority as "specially fitted by reason of experience and training to perform the duties of his position", the appointing authority approves the request, and such request is approved by the personnel board.

are not per se violative of the equal protection clause. Weiss v. Walsh, 324 F.Supp. 75 (D.C.N.Y. 1971), cert.den., 409 U.S. 1129, 93 S.Ct. 939, 35 L.Ed.2d 262 (1973), reh.den., 410 U.S. 970, 93 S.Ct. 1439, 35 L.Ed.2d 706 (1973). She argues, however, that maintenance of one retirement age for elementary and secondary school teachers and another retirement age for all other government employees, including teachers at the college level, is a classification without rational basis and therefore violative of the equal protection clause of the 14th Amendment.

We recognize that "the compelling state interest" test has been held applicable in cases involving suspect classifications. E.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, L.Ed.2d (1974); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968) (legitimacy); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (race).

We have been cited to no cases, nor has our independent research disclosed any, holding that age is a suspect classification. To the contrary, other courts have uniformly upheld mandatory retirement statutes. See, e.g., Fabio v. City of St. Paul, 267 Minn. 273, 126 N.W.2d 259 (1964); Armstrong v. Howell, 371 F.Supp. 48 (D.C. Neb. 1974); Weiss v. Walsh, supra; McIlvanie v. Pennsylvania State Police, 6 Pa.Cmwlth. 505, 296 A.2d 630 (1972); Nelson v. Miller, 25 Utah2d 277, 480 P.2d 467 (1971); Aronstam v. Cashman, 325 A.2d 361 (Vt. 1974).

In *Weiss*, supra, Fordham University offered the plaintiff, a metaphysician of reknown, the Albert Schweitzer Chair in Humanities and subsequently withdrew the offer on the sole ground that he had passed his sixty-fifth year. The plaintiff

sought both injunctive and monetary relief and asserted, *inter alia*, that the University had violated his rights under the 14th Amendment. The plaintiff alleged, and the evidence was clear, that he was pre-eminently qualified to fill the Schweitzer Chair and that notwithstanding his prognosis for length and breadth of productivity was excellent, the University withdrew the offer because of an arbitrary age limit. The court responded to the 14th Amendment argument:

> "Secondly, the absence of specific reference to age in the Fourteenth Amendment does not alone insulate age classifications from constitutional scrutiny any more than does the absence of mention of poverty or residency for example. [Citations omitted] But being a classification that cuts fully across racial, religious, and economic lines, and one that generally bears some relation to mental and physical capacity, age is less likely to be an invidious distinction. Even where the Equal Protection Clause is butrussed by the Sixth Amendment's cross-sectional principle respecting jury selection, the Constitution tolerates some variation in eligibility at the ends of the age spectrum. [Citations omitted] Nor is there a constitutionally mandated minimum age for voting in state and local elections. Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). Even assuming that equivalent importance is accorded to employment opportunity in our constitutional scheme, and given the protection afforded such opportunity by the Due Process and Equal Protection Clauses, I am constrained to hold that Professor Weiss is not the victim of an invidious and impermissible discrimination. Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall injustly in the individual case. If the precision of the law is impugnable by the stricture of general applicability, vindication of the

exceptional individual may have to attend the wise discretion of the administrator. On its face, therefore, the denial of a teaching position to a man approaching seventy years of age is not constitutionally infirm." 324 F.Supp. at 77.

In Fabio v. City of St. Paul, supra, the court held that a statutory classification which required the plaintiff, as an employee on the police payroll, to retire at age 65 was not unconstitutional even though other employees were permitted to change from the police payroll to other payrolls within the department and to continue to serve in more sedentary positions after retirement age. In *McIlvanie*, supra, the court held that a statute providing for mandatory retirement of state policemen at age 60 was not unreasonable and discriminatory in excepting other police officers of a certain rank and assignment from its operation. In response to the plaintiff's contention that a mandatory retirement age for state police officers as a class was not a bona fide occupational qualification, the court stated:

"The fact that a particular police officer is physically fit and able to perform his duties or that minds may differ upon the particular mandatory retirement age selected by the legislature is not proof of want of bona fides as to the qualification otherwise applied uniformly and non-discriminatorily to the selected class." 296 A.2d at 633.

In Aranstram v. Cashman, supra, two assistant judges, both over 70 years of age, attacked the mandatory retirement age of 70 for assistant judges. They maintained that this classification based upon age was one involving a suspect criterion and affected a fundamental right, claiming that only promotion of a compelling state interest would justify it. The appellate court pointed out that the threshold inquiry was two-pronged: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

It held that there was a legitimate state interest in requiring for members of the judiciary the highest possible standards obtainable by minimizing as far as possible the threat of an obviously disabled judge continuing to preside. Also, no violation of any recognized fundamental personal right had been demonstrated. It therefore concluded that the mandatory retirement age passed constitutional muster.

In Armstrong v. Howell, supra, a mandatory retirement provision which did not cover *all* county employees was attacked on due process and equal protection grounds. The plaintiff contended that her classification, which required mandatory retirement at age 69, had no reasonable basis and was irrational and arbitrary. An additional equal protection argument was that some county employees were not covered and some were specifically excluded. She also claimed to be the victim of an irrebuttable presumption of unfitness to work. The federal court made the following response to the plaintiff's argument that age is a factor subject to constitutional protection and that age classifications, as such, are subject to 14th Amendment scrutiny:

"However, and to the contrary, there appears to be no question but what age is a classification which bears a reasonable relation to the law in question and that age has an inevitable and definite relationship with the ability to perform work. Indeed, many employers, public and private, have traditionally adopted policies including mandatory retirement for reasons of good business and management, and it is not the function or the prerogative of this Court to substitute its judgment for that of a duly and legally constituted Civil Service Commission providing, of course, that the judgment of the latter conforms with the Constitution of the United States." 371 F.Supp. at 51-2.

The court found that the mandatory retirement provision reflected a permissible means of accomplishing a rational and

reasonable objective which was to set up an employee retirement system in furtherance of legitimate power and duty of the state to provide reasonable control and reasonable management of the conditions and standards of public employment. The court also rejected the plaintiff's assertion that her right to engage in a common occupation fundamental to liberty, had been abridged. Quoting from Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964), the court rejected a "vested interest" argument:

> "The state, in this case, is in the position of an employer. It is in the position of setting up terms and conditions under which the State will contract for employment and under which an employee may or may not, according to his wishes, accept the proffered conditions. All that is required is that the classifications and the requirements thereunder must have some reasonable relation to the purposes and objectives of the Act. The purposes and objectives of the Act in this situation are to set up conditions and requirements of employment which the employee is free to accept or reject. In evaluating this situation, we take notice of the fact that the State is an employer on the labor market and must meet, and is subjected to, the competitive influences and pressures that are present under modern economic conditions. In the light of this situation, it is reasonable for it to hold out and to set up inducements to employees in a retirement act. The purposes and objectives of a retirement act are manifold. The Legislature may from time to time have to change the conditions to meet new needs and purposes appearing in the economic scheme. The necessity to furnish what is commonly known as 'fringe benefits' in this area in order to secure and keep good employees is manifest under modern conditions. We must evaluate the Act in the light of the employment policy purposes sought to be accomplished. It seems clear to us that the State may make, as a condition of its employment, any sort of a reasonable provision that relates to the manifold objectives and purposes of such an Act. The maintenance of morale, inducement to younger employees to remain, inducement for the older ones to quit when their skills have diminished, special inducements for different high-quality types of employment, and a regard for the necessity to meet competitive provisions in other retirement acts, all are proper objectives. The Legislature has a right to define and determine what conditions or objectives are reasonable in this area. It is clear that State employment is not a vested right, but it is extended at the will of the State, and the State may reasonably make a mandatory retirement system as a condition of such employment, and if this be so, it follows that the State has a right to impose such conditions as are economically and practicably sound. And, in responding to such imposed conditions, the employees have the alternative of accepting such conditions and complying with the conditions that are found in the Act or finding work elsewhere." 371 F.Supp. at 54-5.

We believe this rationale applies equally here. The fact that the Legislature made a distinction between the retirement age for primary and secondary school teachers and the retirement age for other state employees, including college teachers, is not an irrational distinction. The Legislature apparently concluded that after age 65 a teacher's ability to manage and control large groups of young people would be lessened and concomitantly be an undue strain upon the teacher. While in individual cases this might not be so, we cannot say that the Legislature's recognition of the aging process by adoption of age 65 was arbitrary and unrelated to a legitimate state interest, i.e., education.

While the decision to retain a teacher beyond the age of 65 has been committed to the discretion of the School Board, this discretion cannot be exercised maliciously, arbitrarily or discriminatorily. Cf., Dick V. Cahoon, 84 Ariz. 199, 325 P.2d 835 (1958). We are unable to find an abuse of such discretion.

The lower court's denial of relief to appellant was proper and we affirm.

Herbert F. Krucker, Judge

CONCURRING

Lawrence Howard, Chief Judge
James D. Hathaway, Judge

TO –

Jeffrey H. Schwartz, Esq. and
Stanley G. Feldman, Esq.
Miller, Pitt & Feldman
111 South Church Avenue
Tucson, Arizona 85701

J. William Brammer, Jr., Esq.
DeConcini, McDonald & Brammer
901 Lawyers Title Bldg.
Tucson, Arizona 85701

Hon. Richard N. Roylston,
Judge of the Pima County Superior Court
Pima County Courthouse
Tucson, Arizona 85701

Elizabeth Urwin Fritz
Clerk of the Court of Appeals
Division Two
415 West Congress
Tucson, Arizona 85701

West Publishing Company
50 West Kellogg Boulevard
St. Paul, Minnesota 55102

Appendix F

Supreme Court
State of Arizona

No. 12021-PR

ELIZABETH M. LEWIS,
Appellant,

vs.

TUCSON SCHOOL DISTRICT NO. 1
Appellee.

Dated April 9, 1975

The following action was taken by the Supreme Court of the State of Arizona on April 8, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED"

Record returned to the Court of Appeals, Division Two, Tucson, this 9th day of April, 1975.

CLIFFORD H. WARD,
Clerk

By Mary A. Hopkins
Deputy Clerk

/s/ Mary A. Hopkins

Supreme Court, U. S.
FILED
AUG 6 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

J. WM. BRAMMER, JR.
DECONCINI MCDONALD & BRAMMER, P.C.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701

Attorneys for Respondent
Tucson School District No. 1

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT No. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement Of The Case to the end of the first full paragraph on page 4 of the Petition.

However, as to Petitioner's statement concerning her "unique educational background" (page 5), no such evidence was ever presented to the Board. On the contrary, Dr. Thomas L. Lee, Respondent's Superintendent, told Respondent's Board, at a meeting held prior to a public meeting held on October 26, 1972, that there was nothing unique about either Petitioner's abilities or position. This and other statements as to Petitioner's uniqueness were reiterated by Dr. Lee in his deposition taken July 30, 1973, (the relevant extracts of which are reproduced

as Appendix A herein), and were corroborated by Mr. Patrick of Respondent's Personnel Office during the November 5, 1973, meeting between Petitioner and Respondent's Board of Trustees. Mr. Patrick's statements are set out in the portions of the transcript of the November 5, 1973, meeting reproduced as Appendix B herein.

The denial by the Board of Petitioner's Application for Retention was announced on December 19, 1973, not 1972, as stated at page 4, paragraph of the Petition. Contrary ot Petitioner's assertion that the Board heard no evidence as to either of the possible grounds for retention, the Board did consider the difficulty of replacing Petitioner. This is shown by the discussion of Petitioner's lack of uniqueness referred to in the previous paragraph. At the November 5, 1975, meeting of the Board, Petitioner introduced no evidence tending to show that she was in fact irreplaceable. The Board indeed heard no evidence on the issue of whether retiring Mrs. Lewis would be injurious to students. However, at no time did Petitioner attempt to show that her absence would be detrimental, leaving the Board free to conclude that she could be replaced with no damage to the education of the students.

Finally, the document that Petitioner sets out in her Appendix "D" is not the text of the judgment of the Superior Court for which Petitioner is seeking review, but rather a Minute Order which itself was later amended. The correct text of the Superior Court judgment is reproduced as Appendix C herein.

REASONS FOR DENYING CERTIORARI

I. Petitioner Is Presenting Questions Not Argued In The Arizona Appellate Courts

A close examination of the language Petitioner uses in stating her "Questions Presented" reveals two things:

the two questions are in reality identical, and therefore redundant; and much of Petitioner's argument for granting *certiorari* has nothing to do with the questions as stated. Moreover, a comparison of the Petition with Petitioner's arguments in her Opening Brief before the Arizona Court of Appeals (reproduced as Appendix D herein) shows that these questions were not argued in that brief, did not appear as part of the Court of Appeals' actual judgment (reproduced in Petitioner's Appendix "E"), and therefore may not be properly before this Court.

The Arizona Superior Court (judgment reproduced as Appendix C herein) made findings on the retirement age mandated by A.R.S. § 15-1471; on the authority of Respondent to set reasonable standards in retiring its teachers; on the exercise of discretion by Respondent; and on possible deprivation by Respondent of Petitioner's equal protection and due process rights. Petitioner could have appealed all these findings, but instead she based her appeal on one question.

> "Is A.R.S. § 15-1471 unconstitutional insofar as it requires all public school teachers to retire at age sixty-five, whereas all other governmental employees are permitted to continue as State employees until age seventy?"

At least three times in her Court of Appeals brief, Petitioner maintained that this was the sole basis for her appeal.

On the other hand, Petitioner is now attacking the discretion and decision of Respondent under A.R.S. § 15-1471, at least in her "Questions Presented." In other words, she appears to be assuming the validity of the statute and challenging Respondent's interpretation of the statute. Based on Petitioner's own arguments in the court below, this is manifestly not the question on which

the Arizona Court of Appeals rendered its judgment. It is true the last paragraph of the opinion (Petition, Appendix "E" at 31) finds that Respondent did not abuse its discretion in retiring Petitioner. Yet clearly this is dictum. Nowhere in Petitioner's Opening and Reply Brief in the court below did she discuss the Board's discretion; and thus, the only finding necessary for the judgment was the one concerning the constitutionality of A.R.S. § 15-1471.

This Court has held that only in exceptional circumstances will it review a question not raised in the court below. *Duignan* v. *U.S.*, 274 U.S. 195, 200 (1927). With that case, the court simply validated what has long been an axiom of Appellate practice for which hundreds of lower court cases, both State and Federal, could be cited. Since there exists no exceptional circumstances in the case at hand, this Court would not be abusing its discretion in denying *certiorari* on this ground alone.

Petitioner will no doubt point out that sections of her Petition are indeed devoted to the question of the constitutionality of A.R.S. § 15-1471. However, two criticisms would still remain. First, why was the issue not included as part of the "Questions Presented" (or alternately, if Petitioner meant her Question I to cover this issue, why did she not say so in clear, simple language)? Second, and more important, Respondent respectfully submits that even this issue is not properly before this Court, notwithstanding the fact that it was the main question on appeal below.

In making this latter assertion, Respondent is simply repeating its argument made before the Arizona Court of Appeals in its Reply brief (portions of which are reproduced as Appendix E herein). In that court, Respondent in effect pointed out that Petitioner, the Appellant below, made a substantial change of position on

her way up from Superior Court. At trial, it was steadfastly maintained by Petitioner that A.R.S. § 15-1471 made age seventy the compulsory retirement age for Arizona's teachers, and that Respondent discriminated against Petitioner for retiring her at sixty-five, especially when other school districts allowed teachers to continue working past sixty-five. (Although there was never any evidence presented in the Arizona courts as to actions of any other school district with respect to allowing teachers to work past age sixty-five.)

Having lost this argument in Superior Court, Petitioner presented on appeal the question of the constitutionality of A.R.S. § 15-1471. In doing so, she argued that sixty-five was indeed the mandatory retirement age for teachers, but since State employees were allowed to work until seventy, Respondent was denying Petitioner equal protection. In other words, at trial Petitioner argued that seventy was the mandatory age, but on appeal she argued that sixty-five was in fact the mandatory age. Respondent, in its Reply Brief below, contended that the question of whether there exists a rational basis for making sixty-five the retirement age for teachers was not an issue at trial, and therefore not reviewable.

In basing its decision on the issue as framed by Petitioner, the Arizona Court of Appeals implicitly adopted Petitioner's point of view without expressly passing on the reviewability of the question presented. However, if the lower court was erroneous in taking Petitioner's appeal in the first place, this Court should not allow the mistake to go uncorrected by again accepting Petitioner's issues without question.

II. No Significant Question of Federal Law

1. *Equal Protection*

Petitioner contends that it is unconstitutional for Respondent to set a standard of retention of teachers after

sixty-five years of age different from the standard imposed on "other State employees." This argument is based on the assumption that a public school teacher is a State employee, an assumption which is clearly erroneous under the Arizona law.

It is true, as is stated at page 6 of the Petition, that in Arizona, a school district is "an agency of the state." See *School Dist. No. 48 of Maricopa County* v. *Rivera*, 30 Ariz. 1, 243 P. 609 (1926), overruled on other grounds, 93 Ariz. 384, 381 P.2d 107 (1963). However, Arizona case law also recognizes that a school district is a political subdivision of a county, *Sorenson* v. *Superior Court in and for Maricopa County*, 31 Ariz. 421, 254 P. 230 (1927), a status which ultimately makes the school district a political subdivision of the State.

Terminology is important here because Arizona's State Retirement System, Arizona Revised Statutes (A.R.S.) § 38-741 *et seq.*,[1] makes a clear distinction between employees of the State and its instrumentalities on one hand and employees of political subdivisions on the other. For example, A.R.S. § 38-745A, (1973 Supplementary Pamphlet) which defines who is a member of the retirement system, reads in part:

> "All employees and officers of the state . . . and employees of political subdivisions . . . who as a result of state service or service for the political subdivision . . ."

Subsection B of the same statute reads in part:

> "All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds, *and who are declared to be state em-*

[1] Respondent's argument is based on the statutes as they existed in 1973, the time at which Petitioner first became subject to the provisions of the retirement system.

> *ployees and officers by the legislature* for retirement purposes . . . shall be members of the retirement system." (emphasis supplied)

The clear import of the above language is that employees of a political subdivision are *not* State employees unless they are expressly declared to be such.

Under A.R.S. § 38-752 (1973 Supplementary Pamphlet), political subdivisions are authorized to adopt a supplemental retirement system "for officers and employees of the political subdivision. . . ." Finally, the same distinction is made in § 38-759H (1973 Supplementary Pamphlet), which first declares that all State officers and employees must retire at age seventy and then makes that age limit applicable to officers and employees of "political subdivisions of the state. . . ."

The definition of who is an employer supports the above interpretation. "The usual test by which, in common experience, men determine the 'employer' is to ascertain who has authority, on his own account, to 'hire and fire'." *Walling* v. *Sanders*, 136 F.2d 78, 81 (6th Cir. 1943). *Black's Law Dictionary* defines an employer as one who pays salaries. According to A.R.S. § 15-443 (1974 Supplementary Pamphlet), the Board of Trustees of a school district, not the State, is the body authorized to employ and fix the salaries of teachers. The statute reads in part:

> "The Board of Trustees may at any time employ and fix the salaries of teachers. . . ."

See also *Fry* v. *Bd. of Educ. of City and County of San Francisco*, 17 Calif. 2d 753, 112 P.2d 229, 234 (1941) (stating that "the relation between the board and a teacher is that of employer and employee. . . ."); and 68 Am. Jur. 2d at 458, 469, Schools, §§ 128, 138.

Even if teachers were considered State employees, A.R.S. §§ 15-1471 and 38-759 are not in conflict because: (a) A.R.S. § 38-752 allows a political subdivision to devise

its own supplementary retirement system; and (b) nothing in A.R.S. § 38-759 expressly prohibits a political subdivision or even the State from requiring retirement earlier than age seventy. In any case, the purpose of A.R.S. § 38-759 is to establish the earlier time at which a member may retire and still receive benefits, and not to set out regulations concerning retirement between the ages of sixty-five and seventy.

A fortiori, if a teacher is not an employee of the State, then the fact that the relevant retirement statutes allow a teacher to be retired earlier than State employees does not constitute a denial of equal protection. The presumption that runs through the retirement statutes is that employees of the State and of political subdivisions are two separate groups, although all employees of each class are subject to the State Retirement System. If Petitioner wishes to challenge the rationality of creating these two groups in the first place, then Respondent will point out that the whole purpose of creating political subdivisions is to set up separate entities in order to handle local governmental affairs. If a rational basis for the existence of a classification is present, then a challenge based on the Fourteenth Amendment cannot be sustained. See *E. G. Graham* v. *Richardson*, 403 U.S. 365, 371 (1971); *Morey* v. *Doud*, 354 U.S. 457, 465 (1957); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). The so-called "compelling state interest" or "strict scrutiny" test is not applicable in this case because this Court, as the Arizona Court of Appeals noted (Appendix "E" of Petition at 26), has not held age classifications to be a "suspect category" and because, as will be argued *infra*, there has been no deprivation or abridgement of a fundamental right.

In its own policies, Respondent has not violated Petitioner's equal protection rights. Contrary to the assertion at page 11 of the Petition, A.R.S. § 15-1471

does not "hold out the promise" of continued employment past sixty-five. Instead, all teachers "shall be retired" at sixty-five unless the School Board approves retention. The statute is explicit in giving a school district discretion in retaining teachers, a discretion which this Court and lower federal courts have deemed to be quite wide, as long as a decision is made within statutory and constitutional limits. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Brooks* v. *School Dist. of City of Moberly*, 267 F.2d 733, (8th Cir. 1959), cert denied 361 U.S. 894. Moreover, the statute does not require that the school district give any reason for its decision on whether to retain a teacher. Thus, the school district is free to adopt any rational criteria in making its decision, especially since there is no legislative history in evidence requiring that these criteria stem from any specific educational purpose or purposes.

Respecting the possible criteria for retiring or retaining teachers after sixty-five, it is simply not true that, as Petitioner claims at 7, Respondent or the State of Arizona could put forward only one rationale. The reason that Respondent, in its Brief in the court below (reproduced in part as Appendix E herein), elaborated on the fact that teaching is a profession more demanding than others is that Petitioner first raised this issue in her Opening Brief on appeal (reproduced as Appendix D herein). In doing so, Petitioner forced Respondent to argue factual questions not previously presented, and upon which no evidence had been adduced. She should not be permitted to do the same before this Court.

What other school districts decide concerning the retirement of teachers is of little relevance except insofar as those decisions may provide non-controlling examples of what may or may not be reasonable. As long as the Board does not discriminate among its own employees

(and Petitioner has made no such allegation), then Petitioner has not been deprived of her Fourteenth Amendment rights. Respondent is certainly not trying to avoid the Teacher's Retirement Act, as Petitioner charges at Page 10, but rather has complied with statutes which themselves are constitutional and has validly exercised its discretion.

2. *Due Process*

Respondent concedes the point that the right to follow a vocation or profession is a "property right" which cannot be deprived without due process. However, if A.R.S. § 15-1471 holds out no "promise" of continued employment past age sixty-five, as argued *supra*, then school district employees, even if tenured, cannot be said to have a legitimate claim of employment after that age, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972) (dealing with the dismissal of untenured college professor). Thus Petitioner does not have any property right and considerations of due process do not apply. *Bd. of Regents* v. *Roth*, *supra*.

Assuming, *arguendo*, that there is a property right involved here, due process requirements of notice and hearing have been complied with. Petitioner had notice of probable retirement at sixty-five through A.R.S. § 15-1471 and she was given a hearing on November 15, 1973, (see Appendix of Petition at 19). Apparently, Petitioner is confusing the possible due process and equal protection issues here. She cites cases such as *Goss* v. *Lopez*, —— U.S. ——, 95 S.Ct. 729 (1975), which deal with the absence of notice and hearing, but uses them to support the proposition that the State may not set different standards for various groups of employees. In addition, she cites no cases to support her argument that there is a right to continue teaching after normal retirement age. Respondent has in fact more than fulfilled its duties by providing notice and hearing where none were constitutionally necessary.

III. No Conflict Of Decisions

As Petitioner herself states at page 5 of the Petition, this is not a mandatory retirement age case. Therefore, cases dealing with mandatory retirement ages are not relevant here; and the fact that this Court has granted review in *Massachusetts Board of Retirement* v. *Murgia*, 376 F.Supp. 753 (D. Mass. 1974), has no bearing on the case at hand. Furthermore, even if such cases were pertinent, they all support *reasonable* age limits. Finally, Petitioner cites no decisions limiting a Board's discretion where constitutional safeguards have been observed, so that this Court is not being called upon to resolve any important conflicts in judicial decisions.

CONCLUSION

For all the reasons stated above, the decision of the Supreme Court of Arizona to deny review of Petitioner's case and the decision of the Court of Appeals on which that denial was based (set out in Appendix "E" to Petitioner's brief at 23 *et seq.*) were clearly correct. There has been no deprivation of Petitioner's Fourteenth Amendment rights which needs redress by this Court. Since this is a case involving the proper exercise of discretion on the part of Respondent, there is no need for the Court to impose additional standards on Respondent's decision making process. This is all the more true since retirement criteria, if reasonable and constitutional, are a matter of local and not national concern. A decision that Mrs. Lewis should be allowed to continue working would have little application to other litigants and situations, because other school districts would still retain the discretion to set their own retirement standards. For this Court to reverse Respondent's decision and strike down

the Arizona statute which allows Respondent discretion in such matters would be unwarranted invasion of the legislative sphere of State and local governmental activity. As argued *supra*, the Arizona legislature has not discriminated between sets of State employees: it has simply permitted different and distinct public employers to set their own rational retirement ages. This difference in treatment is consonant with the Constitution and its protections.

It is therefore respectfully submitted that Mrs. Lewis' Petition For Writ Of Certiorari to review the judgment of the Arizona Supreme Court denying the Petition for Review and the judgment on the merits of the Arizona Court of Appeals should be denied.

RESPECTFULLY SUBMITTED this 5th day of August, 1975.

DeConcini McDonald & Brammer, P.C.

BY J. Wm. Brammer, Jr.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701

Attorneys for Respondent
TUCSON SCHOOL DISTRICT NO. 1

APPENDIX

APPENDIX A

Portion of Deposition of Dr. Thomas Lee, Superintendent of Tucson School District No. 1 (taken July 30, 1973)

Q So then would it be fair to say that you judge each application for retention the same way you would judge each application to be hired as a school teacher?

A Essentially the same. There are some differences, of course, in that from my point of view a person applying for retention after retirement age needs to have certain unique abilities or capacities which are not necessarily a requirement of people in beginning teaching. I think we have got two different matters at hand here.

Q What unique, what unique ability or assets do you feel a person seeking retention should have that a person seeking a job as a beginning teacher does not have, and that will in your mind, would justify retention?

A From my point of view since the retirement law sets forth the age of 65 as the appropriate retirement age, it would seem to me beyond that point a person would need to have some unusual, some significant, unique quality which would not be realized by someone else, and if they have this kind of quality then naturally it would be working to the detriment of the district to see this person discharged. But if there is no, nothing other than the usual high ability which we think our people generally have, there is nothing unique about that, and therefore, the individual can be replaced and the purpose of the Retirement Act can come into force.

Q When you say, "unique ability," could you define it a little more precisely the type you refer to?

A For instance, the district has, since I have been working with it, continued the employment of some individuals beyond the age of 65 who have these unique abilities. For instance, C. A. Carson who was Associate Superintendent for some years, had been handling the district's recruitment program, visiting colleges around

the country and continuing placement offices and talking with prospective teachers and he had developed a contact with the placement office and with the colleges which was personal and I think rather unique and had permitted us through that contact to acquire some of the finest teachers available anywhere. So upon his retirement he wanted to continue this part of his work and the Board approved it, and until his death he continued under contract to do the recruiting for the district because of his unique ability.

Q Well, this unique ability that you refer to in his case was the fact that he knew certain people and had contacts with certain people and no one else that you could find would have the same contact and acquaintanceships that he would have?

A Right.

Q When we refer to a teacher as Mrs. Lewis, as distinguished from someone in an administrative job such as Mr. Carson, what type of unique ability do you refer to?

A Well, we haven't, so far as I know, approved a classroom teacher for continuing because it's much more difficult for a teacher to have a highly unusual or unique ability and that can be replaced. I can think of one or so that I would have thought possibly would fit such a bill, but they have been interested in continuing but they didn't ask and so they didn't.

Q Who are these that you could have?

A For instance, just one case in point, I think a man like George Bassett who had taught at Tucson High School in chemistry was a unique individual. He had taught at the University in training classes with the University Professors and is recognized for his ability in chemistry and it went far beyond the local district. I felt George possessed characteristics of a good teacher that just simply are not possessed by more than one out of a thousand and I think it was too bad that we had

to lose his services, but, he didn't want to teach anymore.

Q Had you actually observed Mr. Bassett teaching?

A Yes.

Q So when we talk about teaching ability, are we talking about teachers in sort of a prize winning category as distinguished just from the ordinary competent teacher?

A I think it would be some capacity or something that provided the district, which the district could not provide otherwise and—

Q Some unique level of competency, would that be it?

A Well, possibly, it's very difficult to put these things into words, that is why we had a struggle for years over teacher evaluation.

Q Aside from Mr. Bassett whom you have mentioned, is there any other teacher that you can think of that would have possessed the type of unique ability which in your mind would have justified retention had they applied?

A Well, at the moment I can't recall one here in Tucson. There probably are, I just haven't had that kind of close contact with them. I just happened to know George quite well.

Q Do you know whether or not Mrs. Lewis has this type of unique ability such as Mr. Bassett had that might have justified her retention?

A Well, I haven't had any indication from any source that she had unique abilities. She is a very competent, very able, good teacher, but I think we have many, many, many of them and they are available for employment at this point to replace people of this kind.

* * * *

APPENDIX B

Portion of Minutes of Tucson School District No. 1, Meeting, November 5, 1973

BY THE CHAIRMAN: This is Mr. Bruce Patrick, Personnel Office.

Mr. Patrick, would you—I think Dr. Lee has suggested that you might be able to suggest some limit on the employment situation in terms of District 1 and availability of teachers and pertinent material that would be of anyone to both the Board and to Mrs. Lewis.

BY MR. PATRICK: All right, sir. Well, I checked in our applications that are currently on hand. In our department prior to August 15th, we had 304 applications on hand. This is in the area of English, Journalism, Language, Arts, Reading and Speech English. Since August 15th we received in those specific areas, 14 additional applications which makes a total of 318. By the same token, all together in the file, where we do a lot of cross filing between social studies and English, we do have a total of 369 applications in our file. In the area from English down to Speech English, the number of people that were new to our district this fall in these areas, amounted to 15 at the high school level. That would be 309 and 12½ at the Jr. High School level, we currently have approximately 339 people that are involved in some way, shape or form in the teaching of English in our secondary level.

Does the Board have any questions?

BY BOARD MEMBER: What about the qualifications of these 339 that you have on file. What kinds of people are they, new teachers; are they new teachers with experience or—

BY MR. PATRICK: It would be anywhere from brand new to, I would guess, highly experienced in number of years, but these are people that are certified, or could be certified in English in the area.

BY BOARD MEMBER: Do they all have Secondary Certificates or isn't it necessary, or do you distinguish—on—do you have some allocation on file for just an elementary certificate that would be capable of teaching in a Jr. High School?

BY MR. PATRICK: This does not—well, these figures that I gave you are all people that could be certified at a secondary level. Now, of course, all of the—most all of the elementary applications which are not counted in this go from A-B Arizona says we could work. I say we—I mean, elementary, we could work at a Jr. level. These are the only people that are certified for secondary which the old certificate would say 7-12.

BY THE CHAIRMAN: Are there any other questions, Mr. Brammer?

BY BOARD MEMBER: You mentioned the date of August 15th, that is 1973?

BY MR. PATRICK: Yes.

BY THE BOARD MEMBER: Those were on hand as of August 13, 1973?

BY MR. PATRICK: Yes.

BY THE CHAIRMAN: Mr. Schwartz, do you have any questions?

BY MR. SCHWARTZ: I'm not sure I understand the thrust of Mr. Patrick's remarks; I would like some clarification.

BY THE CHAIRMAN: Mr. Lee?

BY MR. LEE: Mr. Patrick, will you indicate to the Board when you replace or retire or someone was leaving and apparently based on your information, could we replace every English teacher in the district if they were to quit simultaneously? I felt that was information—that was, if they all quit together. Does that answer your question?

BY MR. SCHWARTZ: Yes.

No, I'm afraid I don't see the relevancy to the question that we are here for and that is to evaluate Mrs. Lewis' application; that could be pointed out. I would appreciate it.

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. 142873

ELIZABETH LEWIS,
Plaintiff,

vs.

TUCSON SCHOOL DISTRICT NO. 1,
Defendant.

JUDGMENT

This matter having come on regularly for hearing before the Court, sitting without a jury, on February 25, 1974, and counsel for Plaintiff and Defendant having submitted memoranda to the Court for consideration, and the parties having entered into a stipulation approved for filing by the Court on February 11, 1974, and counsel for both parties having argued the matter to the Court, the Court finds that the language of A.R.S. § 15-1471 indicates that a teacher shall be retired at the end of the school year following the date on which the teacher attains the age of sixty-five (65), unless continued employment is approved by the employer. In no event may a teacher be employed for a school year past the year in which the teacher attains the age of seventy (70). However, the legislature did not set out a standard for the employer to follow in determining whether to approve continued employment past age sixty-five (65). In such situations the Court will infer that a standard of reasonableness is to be applied.

The Court further finds that Defendant has set as its standard one that calls for approval of continued

employment past age sixty-five (65) if termination of the employee's services would prove injurious to students or if the employee would be difficult to replace. The Court finds this standard to be reasonable.

The Court further finds that Plaintiff has now had her application considered on its own particular merits by the Defendant. The Defendant has exercised the discretion which it had a duty to exercise. The function of the Court in reviewing the decision of the Defendant is to determine whether or not the evidence presented to the Defendant sustains the decision of the Defendant, and not to hold a trial *de novo*. The Court finds that the evidence was sufficient to sustain the decision. The Defendant's determination was not arbitrary, nor capricious, nor an abuse of discretion.

The Court further finds that there was no deprivation by Defendant of Plaintiff's right to pursue a calling, or any invidious discrimination against Plaintiff on the basis of age.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant be, and hereby is, awarded judgment from and against Plaintiff on Plaintiff's Supplemental Complaint in special action filed herein, and that Plaintiff take nothing thereby, and that Defendant be awarded its costs.

DONE IN OPEN COURT this 26 day of March, 1974.

/s/ Richard N. Roylston
Judge of the Superior Court

APPROVED as to form this 25 day of March, 1974:

MILLER, PITT & FELDMAN, P.C.

By /s/ Jeffrey H. Schwartz
Jeffrey H. Schwartz, Esq.
111 South Church Avenue
Tucson, Arizona 85701
Attorneys for Plaintiff

APPENDIX D

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CIV 1968

ELIZABETH LEWIS,
Appellant,

vs.

TUCSON SCHOOL DISTRICT No. 1,
Appellee.

APPELLANT'S OPENING BRIEF

NATURE OF THE CASE

This is an appeal by Mrs. Elizabeth Lewis, Plaintiff below, solely on the question of whether *A.R.S.* § 15-1471, which singles out public school teachers from all other governmental employees and requires them to retire at age 65, invidiously discriminates on the basis of age and therefore violates the equal protection clauses of the state and federal constitutions.

HOW THE ISSUES WERE DECIDED AND WHAT JUDGMENT WAS GIVEN

Appellant filed a special action in the Court below, alleging, inter alia, that as applied to Appellant, *A.R.S.* § 15-1471 violated the equal protection clauses of the state and federal constitutions. Appellant also urged Tucson School District No. 1 and the Court below to

interpret the statute by adopting a standard of retention which could reasonably be inferred from the Teachers Retirement Act and would be nondiscriminatory and would, therefore, save the statute from being held void. In the absence of Appellee's adopting such an interpretation, Appellant urged that *A.R.S.* § 15-1471 denied equal protection under the law. The Court below declined relief.

Appellant then attacked the interpretation of the statute as made by the School Board and the Court below, by original special action in the Court of Appeals and the Supreme Court of Arizona. Both Courts declined to accept jurisdiction of Mrs. Lewis' petition for relief, thereby giving approval to the standard of retention adopted by the School Board and the Court below. The question on this appeal, therefore, is whether the decision of the School Board and the judgment of the Superior Court of Pima County is erroneous when considered in the light of the prohibition against denial of equal protection of the law.

QUESTION PRESENTED FOR REVIEW

IS *A.R.S.* § 15-1471 UNCONSTITUTIONAL INSOFAR AS IT REQUIRES ALL PUBLIC SCHOOL TEACHERS TO RETIRE AT AGE 65 WHEREAS ALL OTHER GOVERNMENTAL EMPLOYEES ARE PERMITTED TO CONTINUE AS STATE EMPLOYEES UNTIL AGE 70?

FACTS

Tucson School District No. 1 interpreted *A.R.S.* § 15-1471, which requires public school teachers to retire at age 65 unless they obtain their employer's approval, to compel the retirement of all teachers at age 65 except upon a showing of irreplaceability and damage to the students. As a result of that interpretation of *A.R.S.*

§ 15-1471, Mrs. Lewis was forced to retire at age 65, even though it was conceded she was mentally and physically fit and competent to continue teaching successfully as an employee of the State. Mrs. Lewis brought a special action in Superior Court alleging inter alia that *A.R.S.* § 15-1471 violated the equal protection clauses of the state and federal constitutions.

Mrs. Lewis sought an interpretation of the statute which would have avoided its constitutional infirmity by requiring Tucson School District No. 1 to continue employing teachers who attain the age of 65 if they are mentally fit and competent to continue teaching, but such interpretation was not adopted by the School Board nor by the Court below. To the contrary, *A.R.S.* § 15-1471, as interpreted by the School Board, was held to be reasonable and not to invidiously discriminate against Mrs. Lewis on the basis of her age. This application of the statute to Mrs. Lewis was upheld by the Court of Appeals and the Supreme Court of Arizona when they declined to accept jurisdiction in special actions filed by Mrs. Lewis.

Mrs. Lewis presently challenges *A.R.S.* § 15-1471 as now interpreted, on the grounds that it conflicts with the policy of the State of Arizona as manifested in *A.R.S.* § 38-759, under which all other State employees, including educators, are not forced to retire until age 70, and are allowed in special circumstances to continue teaching past the age of 70.

The record on appeal establishes (insofar as relevant to this appeal) that Mrs. Elizabeth Lewis was a "continuing teacher" at Townsend Junior High School, a subdivision of Tucson School District No. 1, for fifteen successive years. She properly made application to Appellee School Board for renewal of her employment contract in the school year in which she attained the age of 65 in accordance with *A.R.S.* § 15-1471. Her application

was not considered on its own individual merits by Appellee and was summarily denied. On June 6, 1973, Mrs. Lewis brought a special action attacking the Board's abuse of discretion in failing to approve her application, and challenging the Board's policy of refusing employment to teachers who reached the age of 65 as a denial of due process and equal protection arising under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Arizona. The Court ruled that she had a right to have her application individually considered on its own merits and ordered Appellee to so consider her application.

On November 5, 1973, Appellee Board met in closed, informal session with Appellant and her attorney. Appellee, though previously requested by Appellant, failed to furnish Appellant with any indication of the criteria upon which their decision would be reached. Appellee did accept oral and written evidence from Appellant, but permitted no other person except Appellant's attorney to speak in her behalf.

The evidence submitted to the Board clearly and convincingly demonstrated the following:

1. Appellant is physically and mentally fit and competent to continue teaching;

2. Appellant has a distinguished education background which includes 39 years of dedicated service to her students;

3. Appellant has received in prior years voluminous unsolicited letters of recommendation from students and parents commending her teaching abilities;

4. Appellant has won the respect of students, parents and teachers and has an established reputation in the community as an excellent teacher;

5. Appellant's principal, Clarence Logan, who evaluated Appellant's teaching abilities on June 8, 1973, in

the course of his regular duties, gave Appellant an "Excellent" on her over-all rating and commented: "Mrs. Lewis is a rarity."

6. Principal Logan on or about October 22, 1972, forwarded Appellant's appeal for continued employment after age 65 to Appellee and made the following recommendation:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

7. Appellant was nominated in 1973 for The Best Teacher in Arizona Award;

8. Appellant's students have consistently won first prizes in local and state spelling and essay contests;

9. Appellant has made a variety of extracurricular contributions to her school as supervisor of the students' literary magazine, newspaper, creative writing and stock market clubs;

10. The failure to rehire Appellant would deprive students, parents and the community of a truly professional teacher.

On December 18, 1973, Appellee Board refused to approve Mrs. Lewis' application at its regularly scheduled public meeting.

In a judgment dated March 26, 1974, the Honorable Richard N. Roylston found that *A.R.S.* § 15-1471 did not discriminate against Appellant on the basis of age and thus did not work a violation of equal protection.

The sole question presented on appeal is whether two conflicting Arizona statutes which set forth different retirement ages for educators is a classification without rational basis which invidiously discriminates against Appellant and denies her equal protection under the law.

ARGUMENT

I. HAVING ONE MANDATORY RETIREMENT AGE FOR ELEMENTARY AND SECONDARY SCHOOL TEACHERS AND ANOTHER FOR OTHER GOVERNMENT EMPLOYEES IN THE STATE OF ARIZONA CREATES A CLASSIFICATION.

A.R.S. § 15-1471 provides as follows:

> "Any teacher in active service who becomes a member of the state employees' retirement system pursuant to provisions of this article, shall be retired for service at the end of the school year following the date upon which he attains the age of 65, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of 70, whether or not they apply to be retained."

This retirement provision is applicable to teachers from grades kindergarten through high school employed by political subdivisions throughout the State.

This section contrasts sharply with the retirement regulations prescribed for other public officers and employees.

A.R.S. § 38-745 establishes a retirement system open to "all employees and officers of the state and instrumentalities of the state and all officers and employees of political subdivisions," if the employees of political subdivisions are compensated "wholly or in part from state funds" and "are declared to be state employees and officers by the legislature for retirement purposes."

Members of the State Retirement System are allowed to retire upon attaining the age of 65, but may be com-

pulsorily retired only upon attaining the age of 70. *A.R.S.* § 38-759 H. An additional provision provides that "employees of institutions under control of the Arizona Board of Regents who reach the age of 70, as long as they continue to render valuable service to the institution employing them, may continue to be employed at the discretion of the Board of Regents." *A.R.S.* § 38-759 I.

All State employees, and any county and local employees, are covered by *A.R.S.* § 38-759. This is also the section applicable to retirement for service for members of the State University system. Thus, educators who teach at a college level may not be mandatorily retired until the age of 70. Even after that age, they may be continued in employment at the discretion of the Board of Regents.

In sharp contrast to this treatment is that of educators teaching at the elementary and secondary levels. *A.R.S.* § 15-1471, as interpreted by the Arizona Supreme Court, requires mandatory retirement at age 65. Although a teacher may be continued in employment until age 70, this is at the discretion of the individual employer.

These two statutes conflict and result in the classification of certain educators who must retire at age 65, and others who may remain in active service until age 70. Teachers at the college level may not be forced to retire before age 70. See *Finch* v. *State Department of Public Welfare*, 80 Ariz. 226, 295 P.2d 846 (1946). Educators who work at the elementary or secondary level may be forced to retire at age 65. This classification is not dependent upon educational, professional, or personal attainments, since many educators who could teach at the college level choose to teach at the elementary or secondary level.

Although regulations establishing age ceilings for public employment are not, per se, prohibited by and therefore violative of the equal protection clause, *Weiss* v. *Walsh*, 324 F. Supp. 75 (D.C.N.Y. 1971), maintenance by a state of one retirement age for elementary and secondary teachers, and another retirement age for all other government employees including teachers at the college level, creates a distinct class of government employees without a constitutionally permissible basis therefor.

II. THIS CLASSIFICATION OF GOVERNMENT EMPLOYEES IS WITHOUT RATIONAL BASIS AND DENIES APPELLANT EQUAL PROTECTION UNDER THE LAW.

The equal protection clause of the Fourteenth Amendment of the Constitution of the United States prohibits classifications and distinctions which are arbitrary and capricious and bear no reasonable relation to the purpose of the law. *F. S. Royster Guano Company* v. *Commonwealth of Virginia*, 253 U.S. 412 (1919). When a "fundamental right" or a "suspect category" is involved, the burden upon the state is much stricter and it must show a compelling state interest in order to uphold its regulation. *E.g. Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Levy* v. *Louisiana*, 391 U.S. 68 (1968) (legitimacy of birth); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (race); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (voting); *Cleveland Board of Education* v. *LaFleur*, 94 S.Ct. 791 (1974) (sex).

The burden is upon the state to justify its otherwise impermissible regulation of constitutional rights by proving that it has either a rational basis or compelling state interest to justify its actions. *Murgia* v. *Massachusetts Board of Retirement*, 42 U.S.L.W. 2640 (D.C. Mass. 1974).

Nelson v. *Miwa* (Hawaii Circuit Court, 1973), facing a nearly identical fact situation, failed to find any rational basis in a classification which forced college professors to retire at age 65, but permitted other state employees to work until age 70. The District of Columbia Court of Appeals has gone even farther and questioned the legitimacy of forced retirement at age 70 of a government attorney by reversing a lower court dismissal and remanding the case for consideration of its constitutional claims. *Weisbrod* v. *Lynn*, 494 F.2d 1101 (1974).

Appellee has failed to show the rationale behind providing different retirement ages for educators. It cannot be argued that teaching at the elementary or secondary level is more demanding—physically or intellectually—than teaching at the college level. Nor can it be argued that education is a more demanding profession than that of any other state employee who may not be compulsorily retired until age 70.

However, even if Appellee can present data showing that elementary and secondary-level educators must meet physical and mental standards higher than those required for all other State employees, it is incumbent upon Appellee to show that Mrs. Lewis fails to meet these standards. This Appellee cannot do, since it has already admitted that Mrs. Lewis is both physically and mentally competent to perform her job. The two statutes may be constitutionally reconciled only if the State can first prove that a higher level of mental and physical acuity is required for elementary and secondary teachers, and then show that it has set up standards which examine individuals on those factors only, and make no distinction solely on the basis of age.

This classification of State employees thus remains without a rational basis and effects a denial of Appellant's constitutional right of equal protection.

III. CLASSIFICATION OF GOVERNMENT EMPLOYEES FOR RETIREMENT PURPOSES DEPRIVES APPELLANT OF PROPERTY RIGHTS PROTECTED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Forced retirement at age 65 is detrimental to Appellant and others in her class, both in a pecuniary and non-pecuniary manner. First, she is deprived of her right to pursue a calling or profession, thereby to work and to sustain herself. *York* v. *State*, 498 P.2d 644 (Hawaii 1972). Second, by being required to retire at age 65, when no other public employees can be compelled to retire until age 70, Appellant is deprived of the opportunity to earn additional retirement credits between the ages of 65 and 70 and thereby further her retirement security. Such inequality of retirement between State employees, specifically educators at different levels within the state education system, has no constitutionally permissible basis and violates the equal protection clause. *Nelson* v. *Miwa* (Hawaii Circuit Court, 1973).

CONCLUSION

Appellant Mrs. Lewis has been denied equal protection by virtue of an impermissible statutory classification which forces her to retire at age 65, but permits other State employees, including educators at the college level, to remain at their jobs until age 70. This classification is impermissible since no rational basis exists which can justify such unequal treatment of government employees in general, and educators in particular.

It is admitted by Appellee that Mrs. Lewis is a competent teacher, mentally and physically capable of continuing to work. Appellant contends that this Court, upon review, should grant her that constitutionally protected

right to be free of impermissible classification, and set aside the judgment in the Court below and find for Appellant.

Dated this 3rd day of September, 1974.

MILLER, PITT & FELDMAN, P.C.
by Stanley G. Feldman

APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CIV 1968

ELIZABETH LEWIS,
Appellant,

vs.

TUCSON SCHOOL DISTRICT #1,
Appellee.

BRIEF FOR APPELLEE

DECONCINI MCDONALD & BRAMMER, P.C.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Appellee

Filed October 2, 1974

QUESTION PRESENTED FOR REVIEW

IS A.R.S. § 15-1471 UNCONSTITUTIONAL INSOFAR AS IT REQUIRES ALL PUBLIC SCHOOL TEACHERS TO RETIRE AT AGE 65, WHEREAS ALL STATE EMPLOYEES ARE PERMITTED TO CONTINUE WORKING UNTIL AGE 70?

ARGUMENT

I.

APPELLANT, THROUGH FAILURE TO RAISE THIS ISSUE IN THE SUPERIOR COURT, CANNOT PRESENT THIS ISSUE TO THE APPELLATE COURT FOR DECISION.

Initially, Appellant did not raise in the lower court the question she now raises on appeal; and, therefore, this issue should not now be decided by the Court of Appeals.

Appellant, in her Supplemental Complaint (Count XIV, Page 5, Abstract of Record), asserts an equal protection claim by alleging that all teachers over 65 are not treated equally under A.R.S. § 15-1471. Her contention rests on the fact that many districts retain their teachers over 65 while Appellee does not and such unequal treatment constitutes invidious discrimination and violates Appellant's right to equal protection. Appellant further argued below that teachers over 65 are being denied equal protection as Appellee summarily denies all applications for retention of individual teachers over 65 who wish to continue teaching. (Abstract of Record Pages 25-26) These equal protection arguments were thoughtfully decided by the lower court in favor of Appellee. Having them rejected, Appellant now attempts

to adopt a new theory which allegedly indicates she has been denied equal protection of the laws by Appellee.

Appellant now questions the constitutionality of A.R.S. § 15-1471 insofar as it requires public school teachers to retire at age 65, whereas all other State governmental employees are permitted to continue until the age of 70 pursuant to A.R.S. § 38-759. It is claimed that there is no rational basis for having teachers retire at 65, while all other State employees have mandatory retirement at age 70. Since the question was not raised below, no evidence was presented to support it; and, therefore, the record is devoid of evidence supporting Appellant's position. Appellant raises this naked assertion on appeal, rather than produce in the trial court the factual and legal evidence necessary to support her allegations. Appellant, having failed to raise below the issue she now raises on appeal, asks this court to squarely face the issue without the benefit of having the factual and evidentiary problems settled in the lower court.

The Court of Appeals cannot reverse a trial court on an issue which was never presented to the trial court. *Walker* v. *Continental Life and Acc. Company*, 445 F.2d 1072 (9th Cir. 1971); *Maricopa County* v. *American Pipe and Construction Company*, 431 F.2d 1145 (9th Cir. 1970). Additionally, it is a well known axiom of Appellate practice that matters *not* presented to the lower court will *not* be considered on appeal. *Goldberg* v. *Weiner*, 480 F.2d 1067 (9th Cir. 1973); *Milam* v. *Milam*, 101 Ariz. 323, 419 P.2d 502 (1966); *Bible* v. *First National Bank of Rawlins*, 21 Ariz. App. 54, 515 P.2d 351 (1973); *Leehy* v. *Ryan*, 20 Ariz. App. 110, 510 P.2d 421 (1973); *National Car Rental* v. *Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972); *Weston* v. *State ex rel Eyman*, 8 Ariz. App. 58, 442 P.2d 881 (1968); *Kenyon* v. *Kenyon*, 5 Ariz. App. 267, 425 P.2d 578 (1967).

With the law clearly settled on the proposition that issues cannot be initially raised on appeal, and the record clear that Appellant's equal protection argument was not advanced in the Superior Court under the theory now articulated, this court is left with no choice other than dismissing the appeal and affirming the trial court's decision in favor of Appellee.

* * * *

II.

Although the Appellate Court is not the place to argue previously unpresented factual questions, Appellee will indicate some possible reasons relating to the legislature's decision to set forth a mandatory retirement age for public school teachers.

The public policy of the State of Arizona is clearly manifested by the legislature by the enactment of A.R.S. § 15-1471. The State has a special burden to educate its residents. The heavy responsibility of educating is placed upon the teaching profession which obviously differs from other State employment in many respects including the special vulnerability of the populace in which they teach, the high duty of care owed to that group and the unique responsibility to provide an effective system of education. As most public school teachers would agree, their job is totally dissimilar from other State employees. There is tremendous pressure and duty fostered upon the individual who chooses to teach young adults ranging from ages 5 to 18, many of whom are attending school solely as a result of compulsion. The legislature may have had many legitimate reasons for the statute such as establishing a viable retirement program, the problem of elderly teacher absenteeism, classroom discipline, safety of school children, and the biological changes that are inherent with age. The legislature, in its lawmaking discretion, recognized the complexities of public education and determined in exercising its judgment that all public school teachers should retire at age 65, but provided that they could annually continue until age 70 upon application and school board approval. The difficult decisions concerning allowing teachers over 65 years of age to continue was fully left to the discretion of the local school boards. The United States Supreme Court, as did the legislature of Arizona, has recognized the plethora of problems that confront public education and the discretion allowed school boards in solving them. See *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973).

* * * *

Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,

Petitioner

vs.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,

Respondents

Petitioner's Reply to Respondents' Brief in Opposition To a Writ of Certiorari to the Supreme Court of The State of Arizona

STANLEY G. FELDMAN
MILLER, PITT & FELDMAN, P.C.
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

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In the Supreme Court

of the

United States

OCTOBER TERM, 1975

No. .....

In the Supreme Court of the United States
In and for the District of Arizona

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT NO. 1, et al,
Respondents.

Petitioner's Reply to Respondents'
Brief in Opposition to a Writ of Certiorari

In its Brief in Opposition to the Petition for Writ of Certiorari, Respondent makes three points which were not discussed in Petitioner's Opening Brief.

I
QUALIFICATIONS FOR RETENTION

Respondent argues that there was nothing "unique" about Petitioner's ability and that Petitioner presented no proof of irreplaceability, nor any evidence that the students would be injured by having a different teacher. The relevancy of the test of uniqueness is difficult to ascertain, since neither Petitioner nor Respondent has ever claimed that such a standard would be proper. It may be that Respondent means that "unique" and "irreplaceability" and "injury to the students" are all synonymous. If so, it would be appropriate to consider Respondents' own evaluation of Petitioner's abilities.

Respondent never produced any evidence as to Petitioner's abilities, except some comments from Superintendent Dr. Lee. However, Dr. Lee admitted on deposition that he had no personal knowledge of Mrs. Lewis' abilities, had never seen her teach and could do no more than rely upon the evaulation of others. He admitted further that her principal's evaluation would be the best test of her abilities. Her principal, Mr. Clarence Logan, described her as:

> 1) "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted." (Petition for a Writ of Certiorari, Appendix B, Page 12); and
>
> 2) "Mrs. Lewis is a rarity. She controls her classes well, really teaches students and is vital. Her students leave at the end of the year with a good knowledge of English." (Petitioner's Reply Brief, Supplemental Appendix B, Paragraph XVIII)

In addition the following factors indicated that Mrs. Lewis had abilities which were outstanding if not "unique":

1. Respondent School District's evaluation of Mrs. Lewis' ability as a teacher revealed that Mrs. Lewis was given the highest rating in the following areas:

A. cooperation
B. ability to express herself
C. English usage
D. tact and courtesy
E. punctuality
F. attendance
G. health and vitality
H. poise
I. ability to arouse pupil interest
J. affiliation with professional organizations
K. lesson planning
L. quality of classroom voice
M. participation in community activities
N. teaching techniques and skill
O. control of learning situation

2. She had been given an "average" rating in only one area, i.e., "attitude toward extra assignments," based upon the fact that she has already engaged in four extra-curricular activities (editor of the student literary magazine, sole supervisor of the student newspaper, head of the school's creative writing club and school's stock market club) and was not eager to accept more extra work.

3. According to Respondent School District's own evaluation, Petitioner's over-all rating as a teacher was "excellent".

4. Respondent Board stipulated that it "... had no evidence to contradict that the evidence offered by Mrs. Lewis in support of her physical and mental competence and her value to her former students."

(Petitioner's Reply Brief, Supplemental Appendix B, Paragraphs XVI, XVII, and XIX.)

It is true that Petitioner never presented evidence of "irreplaceability" or "injury to the students." There are two good reasons for this. First, although prior to the hearing before the Board Petitioner's counsel requested that he be informed of the standard could be produced, no such information was given Petitioner. As a result, evidence that was presented to the Board established those factors which are outlined above. It was only after the hearing that the Board decided that the standard was not competency or ability to perform the job, but rather "irreplaceability" and "injury to the students". It is surely not within principles of constitutional due process to reject Petitioner's application for failure to produce evidence to support a standard of retention which was not adopted until after the hearing at which Petitioner's request was rejected.

Secondly, and of equal importance, is the fact that the test of irreplaceability and injury to the students is in and of itself a deprivation of equal protection and due process of law for the simple reason that no one can meet such a standard. It is a violation of equal protection to require Petitioner to meet the standard of irreplaceability and injury to the students in order to be retained to the mandatory retirement age when no other state employee need meet such a standard and it is a denial of due process to require that an impossible standard for retention be met. This is an argument which Petitioner has made consistently in every judicial proceeding which has taken place since the time at which the School Board adopted that standard.

II

PETITIONER HAS RAISED THE CONSTITUTIONAL ISSUES IN A TIMELY MANNER

Respondent argues that the contentions made in Petitioner's Opening Brief were not raised below and were therefore waived and should not be considered in this Court. Interestingly enough, Respondent later admits that those issues were raised. It admits that they were decided (Page 5, Brief in Opposition to Petition for Writ of Certiorari) by the Arizona appellate court, but claims that the Arizona Court of Appeals was in error in deciding that the issues were properly raised from a procedural standpoint in Arizona. We submit that according to well-settled principles the procedure by which issues are raised in the state court is to be judged according to the state law. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Konigsberg v. State Bar,* 353 U.S. 252 (1957), *Whitney v. California,* 274 U.S. 357 (1927); *Cincinnati Packet Co. v. Bay,* 200 U.S. 179 (1905).

Respondent argued below that Petitioner had adopted the wrong procedure, but the Arizona courts did not agree with Respondent's contention and did not dismiss the appeal. Instead, the very issues raised in Petitioner's Opening Brief in this Court were raised below, argued below and decided below. Respondent admits this, but now asks this court to revise Arizona appellate procedure.

The fact of the matter is simply that from the time at which she first learned the standard to be adopted was one of "irreplaceability" and "injury to the students" Petitioner has claimed that such an interpretation of the statute is deprivation of equal protection and due process of the law. Any confusion in determining when each issue was raised is perhaps due to the unusual course of this lawsuit through the judicial system of the State of Arizona. On June 6, 1973, Mrs. Lewis filed a special action against Respondent Tucson School District No. 1

requesting that said school district consider her application for retention in employment after she had attained the age of 65. The Court ordered Respondent to so consider her application application. After the Board had denied her application for retention on the ground that she was not "irreplaceable" and that failure to retain her would not be injurious to her students, Mrs. Lewis filed a Supplemental Complaint protesting the constitutional basis for the Board's decision. An Amended Supplemental Complaint was also filed, as was a Stipulation and Order (attached hereto as Supplemental Appendix "A") also entered whereby certain provisions of the Complaint were admitted and a number of items were admitted to evidence.

A Judgment was entered holding that the standard adopted by the School Board was neither arbitrary, capricious, nor an abuse of discretion under the due process clause, and that there had been no discrimination against the Plaintiff on the basis of age. Petitioner then filed a special action in the Court of Appeals for the State of Arizona (2CA-CIV 1660,) in addition to an appeal in that same court from the Superior Court decision (2CA-CIV 1698). (Portions of the records of both of these actions have been certified to this Court.) The Court of Appeals denied Petitioner's special action and she thereafter petitioned to the Supreme Court of Arizona on special action for extraordinary relief (Supplemental Appendix "B"). The Supreme Court of Arizona denied Mrs. Lewis any relief on her petition for special action, as did the Court of Appeals of the State of Arizona on her appeal from the same Superior Court decision. A motion for Rehearing (Supplemental Appendix "C") was filed with the Court of Appeals. Nevertheless, reconsideration was denied by that court, as was Review by the Arizona Supreme Court.

All issues raised in this Petition (and many which have been omitted) have been presented to the Arizona tribunal. Our

claim below and our claim here is simply and concisely this: We agree arguendo that the State may set compulsory retirement ages. The compulsory retirement ages for all State employees is 70 years. We agree, arguendo, that different compulsory retirement ages may be set for different job classifications. The equal protection clause does not require absolute uniformity but merely uniformity based upon relevant State interests. We would not argue that it would be improper to require retirement of policemen at the age of 60 despite the fact that judges are not required to retire until age 70 or age 80. This is of little help however to Respondent, for the simple reason that the State has not set a different compulsory retirement age for public school teachers than it has set for all other state employees, including teachers. It has set the age of 70 as retirement and has established a retention procedure applicable to all state employees. Again, differing standards may be set for differing categories of state employees depending upon the job. We will concede this arguendo. What we do not concede, however, is that the standard set for public school teachers may be one which is not rationally related to the state interests.

In other words, the State has argued consistently in this proceeding that the job of a public school teacher is more onerous than that of other state employees, and that it is essential therefore to determine that public school teachers applying for retention to age 70 have the ability to perform the job to which they will be assigned when retained. Once differing standards for retention are justified by that argument, it follows simply that it is unconstitutional and a deprivation of equal protection of the law to require Petitioner to show yet a different standard and one not connected to the legitimate state interest (injury to the students and irreplaceability) in order to be retained in her teaching position. See *Smith v. Troyan*, _____ F.2nd_____ (6th Civ. 1975) (reported in 44 U.S.L.W. 2050) (unconstitutional to have weight requirement for jobs as policeman when this requirement not reasonably

related to performance of position). We will concede arguendo that it is a permissible discrimination for the State to require Petitioner to show that she is fit for her job and able to perform its duties. She can make this showing. We have argued below and we argue now that it violates equal protection to justify unequal treatment on the grounds that the State must be assured of the applicant's ability to work and then to require that applicant not only show ability but also meet the additional and impossible burden of showing "irreplaceability" in order to retain her position.

III

PETITIONER IS A STATE EMPLOYEE

Having argued that Petitioner should be shown the door for having raised issues below is an untimely manner (even though the Court below disagreed with Respondent's contentions in that regard and even though such issues were raised, argued and decided below), Respondent then proceeds to argue an issue which has never before been mentioned in the entire sad history of this case. For the first time in its Brief to this Court, Respondent argues that school teachers are not employees of the State, but are only employees of the school district. Petitioner admits that the school district is an arm of the State, but contends that the school district may adopt different standards for its employees than are adopted for state employees. This argument comes too late.

Even if it is to be considered on the merits, we would respectfully point out that Respondent's own brief moots the issue of any distinction between "State employees" and "employees of political subdivisions" by citing *Ariz. Rev. Stat.* § 38-759 (H) (1973 Supplementary Pamphlet) which mandates a retirement age of 70 for both "state officers and employees" and "officers and employees of political subdivisions of the state."

Second, Petitioner has argued throughout that the class to which Mrs. Lewis belongs may be categorized as being all those persons who are members of Arizona's State Retirement System, *Ariz. Rev. Stat.* § 38-741 *et. seq.* A.R.S. § 38-745 (A) defines members of the Retirement System as both "employees and officers of the state" and "employees of political subdivisions." Subsection B of the same statute goes on to declare that employees of political subdivisions who are members of this fund are considered to be State employees. Thus, for purposes of employment and retirement benefits there is no distinction between Mrs. Lewis and any other state employee.

In addition, perusal of *Arizona Revised Statutes,* Title 15 (Education) reveals a statutory system in which all aspects of the professional life of a public school teacher are tightly regulated by the State. There is a State Department of Education (A.R.S. § 15-111) and State Superintendent of Public Instruction who has regulatory and disciplinary powers over all public school teachers within the State system (A.R.S. § 15-121, A.R.S. § 15-231 *et. seq.)* Thus, the standards and regulations regarding tenure, hiring, retention, retirement, receipt of employee benefits, etc., are statutorily decreed for all employees of the State school system. Respondent must ignore these relevant Arizona Statutes if it is to present an argument that Mrs. Lewis is not a State employee. This it cannot do.

RESPECTFULLY SUBMITTED this 25th day of September, 1975.

MILLER, PITT & FELDMAN, P.C.

BY STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

Supplemental Appendix A

In the Superior Court of the State of Arizona
In and for the County of Pima

No. 142783

ELIZABETH M. LEWIS,
Plaintiff,

v.

TUCSON SCHOOL DISTRICT NO. 1,
Defendant.

STIPULATION AND ORDER

The undersigned attorneys for the above named parties stipulate as follows:

(1) Plaintiff is granted leave to amend its Supplemental Complaint to add WARNER B. LEWIS, husband of plaintiff ELIZABETH LEWIS, as a proper party in interest pursuant to Rule 17(e), Arizona Rules of Civil Procedure, and the Supplemental Complaint is deemed so amended.

(2) The allegations of Paragraphs II, IV and V of Count Two of plaintiff's Supplemental Complaint are true.

(3) Letter dated November 5, 1973 from plaintiff's counsel to defendant's counsel is admitted in evidence as plaintiff's exhibit No. 1.

(4) Letter dated November 5, 1973 from Dr. Thomas Lee to plaintiff Mrs. Lewis is admitted in evidence as plaintiff's exhibit No. 2.

(5) Letter dated November 7, 1973 from William Brammer to Jeffrey Schwartz is admitted in evidence as plaintiff's exhibit No. 3.

(6) Letter dated November 8, 1973 from plaintiff's counsel to Dr. Lee is admitted in evidence as plaintiff's exhibit No. 4.

(7) Letter dated November 13, 1973 from Dr. Lee to counsel for plaintiff is admitted in evidence as plaintiff's exhibit No. 5.

(8) Transcription of informal hearing held on November 15, 1973 is admitted in evidence as plaintiff's exhibit No. 6.

(9) Material presented to the School Board by plaintiff on November 15, 1973 in black binder is admitted in evidence as plaintiff's exhibit No. 7.

(10) Letter dated November 20, 1973 from Jeffrey Schwartz to Dr. Lee and letter attached thereto from Olivia Bedford is admitted in evidence as plaintiff's exhibit No. 8.

(11) Letter dated December 14, 1973 from Dr. Thomas Lee to plaintiff Mrs. Lewis is admitted in evidence as plaintiff's exhibit No. 9.

(12) Letter dated December 27, 1973 from William Brammer to Jeffrey Schwartz together with enclosures is admitted in evidence as plaintiff's exhibit No. 10.

(13) Letter dated February 5, 1974 from William Brammer to Jeffrey Schwartz and enclosure thereto is admitted in evidence as plaintiff's exhibit No. 11.

(14) All testimony and documentary evidence admitted at the hearing on the Order to Show Cause, September 4, 1973, shall be considered a part of the record of this proceeding.

(15) The deposition of Dr. Lee taken on July 30, 1973 is admitted in evidence.

(16) The Board has no evidence to contradict the evidence offered by Mrs. Lewis in support of her physical and mental competence, and her value to her former students.

(17) Plaintiff will submit a trial memorandum in support of its Supplemental Complaint to the Court on or before February 11, 1974. Defendant will submit a response to plaintiff's trial memorandum to the Court on or before February 21, 1974. Plaintiff will file a reply to defendant's response on or before February 25, 1974.

(18) The Court will hear oral argument on February 25, 1974, at 11:00 o'clock, a.m., or as soon thereafter as counsel may be heard. Estimated time is one hour.

DATED this 8th day of February, 1974.

MILLER, PITT & FELDMAN, P.C.
Attorneys for Plaintiff

By /s/ JEFFREY H. SCHWARTZ
111 South Church Avenue
Tucson, Arizona 85701

DeCONCINI, McDONALD & BRAMMER, P.C.
Attorneys for Defendant

By /s/ WILLIAM BRAMMER
901 Lawyers Title Building
Tucson, Arizona 85701

ORDER

Pursuant to the foregoing Stipulation, and good cause appearing therefor,

IT IS HEREBY ORDERED that the above-stipulated items be approved and that the Court will hear oral argument on February 25, 1974 at the hour of 11:00 o'clock, a.m. for a period of one-half hour.

DONE IN OPEN COURT this 11th day of February, 1974.

/s/ RICHARD N. ROYLSTON
JUDGE OF THE SUPERIOR COURT

Supplemental Appendix B

In the Supreme Court
State of Arizona ,

No.

ELIZABETH M. LEWIS,

Petitioner,

vs.

TUCSON SCHOOL DISTRICT NO. 1; HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF UNDER RULES PERTAINING TO SPECIAL ACTIONS

Petitioner alleges:

I

Petitioner is a resident of Pima County, Arizona, and at all times material to this action, Petitioner was a continuing teacher employed by Respondent Tucson School District No. 1.

II

Tucson School District No. 1 is a political subdivision of the State of Arizona.

III

Petitioner was a teacher in active service and a member of the State Employees' Retirement System pursuant to A.R.S. 15-1401, et seq.

IV

In the school year of 1972-73, Petitioner attained the age of 65 and made application to be retained in her position as a teacher in accordance with A.R.S. 15-1471.

V

A.R.S. 15-1471 provides as follows:

§ 15-1471.

Retirement of teacher members.

Any teacher in active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year-to-year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of seventy, whether nor not they apply to be retained."

VI

Tucson School District No. 1 has provided forms adopting a procedure so that teachers who reach the age of 65 may make application to continue their employment.

VII

Petitioner made proper application for retention using the forms and following the procedure provided by Tucson School District No. 1. In September, 1972, Petitioner submitted the form entitled "Appeal for Continued Employment after 65." This form included her statement that:

> "I would like to continue work as a contract employee for the 1973-74 school year. I am in good health and will furnish doctors' statements to this effect if required."

Said form also included a recommendation from Mrs. Lewis' principal saying:

> "I consider Mrs. Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

VIII

At a meeting of the Tucson School District No. 1 Board on October 26, 1972, Mrs. Lewis' request was summarily denied. Respondent's policy is to deny routinely applications such as Petitioner's; since 1954 Respondent has approved no request and permitted no teacher to continue employment after age 65.

IX

On or about June 6, 1973, Petitioner commenced special action No. 142873 in the Superior Court of Pima County against Respondent Tucson School District No. 1. Pursuant to an order dated November 1, 1973 (a copy of which is incorporated herein by reference as Petitioner's Exhibit I), Respondent Honorable Richard N. Roylston ordered Respondent Board to meet and to consider Petitioner's application on its individual merits.

X

Pursuant to said order, and at the November 15, 1973 meeting, the Respondent Board received oral and written evidence from Petitioner in support of her application for continued employment (a copy of which is incorporated hereby by reference as Petitioner's Exhibit II).

XI

On December 18, 1973, Respondent Board, at its regularly scheduled meeting, announced its decision as follows:

> "The Board of Education has determined not to approve the request of Mrs. Elizabeth Lewis to teach during the 1973-74 school year following her sixty-fifth birthday. The Board does not question her physical and mental fitness. The Board's position is that A.R.S. 15-1406B provides for the retirement of a teacher 'at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards to the board of trustees (of the retirement system) his application to be retained.' Under the provisions of this statute, the Board of Education may retain an employee on a year-by-year basis between the ages of sixty-five and seventy. If termination of the service of an employee would prove injurious to students, or if the employee would be difficult to replace, the Board of Education would be inclined to approve his request to continue employment. Since neither of these problems exist in this instance, due to the availability of many fine replacements in Mrs. Lewis' field of teaching, and since she could be and was replaced by a very able teacher, the Board of Education does not approve her request to continue."

XII

On January 9, 1974, Petitioner filed a Supplemental Complaint for Special Action, challenging Respondent Board's decision of December 18, 1973 (a copy of said Complaint is attached hereto as Petitioner's Exhibit III).

XIII

On March 26, 1974, the Honorable Richard N. Roylston entered an order finding the issues in favor of Respondent (a copy of said order is incorporated herein by reference as Petitioner's Exhibit IV). By said order, the Court below found:

> " . . . that the language of A.R.S. §15-1471 indicates that a teacher shall be retired at the end of the school year following the date on which the teacher attains the age of sixty-five (65), unless continued employment is approved by the employer. In no event may a teacher be employed for a school year past the year in which the teacher attains the age of seventy (70). However, the legislature did not set out a standard for the employer to follow in

determining whether to approve continued employment past age sixty-five (65). In such situations the Court will infer that a standard of reasonableness is to be applied.

"The Court further finds that Defendant has set as its standard one that calls for approval of continued employment past age sixty-five (65) if termination of the employee's services would prove injurious to students or if the employee would be difficult to replace. The Court finds this standard to be reasonable.

"The Court further finds that Plaintiff has now had her application considered on its own particular merits by the Defendant. The Defendant has exercised the discretion which it had a duty to exercise. The function of the Court in reviewing the decision of the Defendant is to determine whether or not the evidence presented to the Defendant sustains the decision of the Defendant, and not to hold a trial *de novo*. The Court finds that the evidence was sufficient to sustain the decision. The Defendant's determination was not arbitrary, not capricious, nor an abuse of discretion.

"The Court further finds that there was no deprivation by Defendant of Plaintiff's right to pursue a calling, or any invidious discrimination against Plaintiff on the basis of age."

XIV

Subsequent to the decision of Respondent Honorable Richard N. Roylston, Petitioner filed a Petition for Special Action in Division 2 of the Court of Appeals of Arizona; by order dated June 4, 1974, the Court of Appeals denied Petitioner's petition without written decision or comment.

XV

Petitioner has petitioned for rehearing before the Court of Appeals and brings this matter by special action and will further petition for review when and if the Court of Appeals rules on the Motion for Rehearing.

XVI

The evidence adduced at the hearing before the Respondent Board and submitted to the Respondent Court established without contradiction each of the following:

1. Mrs. Lewis taught English for students preparing for college.

2. Respondent School District's evaluation of Mrs. Lewis' ability as a teacher revealed that Mrs. Lewis was given the highest rating in the following areas:

a. Cooperation
b. Ability to express herself
c. English usage
d. Tact and courtesy
e. Pjnctuality
f. Attendance
g. Health and vitality
h. Poise
i. Ability to arouse pupil interest
j. Affiliation with professional organizations
k. Lesson planning
l. Quality of classroom voice
m. Participation in community activities
n. Teaching techniques and skill
o. Control of learning situation

3. She had been given an "average" rating in one one area, i.e., "attitude toward extra assignments," based upon the fact that she was already engaged in four extra-curricular activities (editor of the student literary magazine, sole supervisor of the student newspaper, head of the school's creative writing club and school's stock market club) and was not eager to accept more extra work.

XVII

According to Respondent School District's own evaluation, Petitioner's over-all rating as a teacher was "excellent."

XVIII

According to Respondent School District's own evaluation of whether Mrs. Lewis would be recommended for re-employment:

> "Mrs. Lewis is a rarity. She controls her classes well, really teaches students and is vital. Her students leave at the end of the year with a good knowledge of English."

XIX

Respondent Board stipulated that it " . . . had no evidence to contradict the evidence offered by Mrs. Lewis in support of her physical and mental competence and her value to her former students."

XX

In the school year 1970-71, at age 63, Mrs. Lewis was nominated for the Arizona award for outstanding teacher of the year.

XXI

All of the evidence presented to the Respondent Board and to Respondent Court indicated that Petitioner was exceptionally well qualified to continue teaching and was physically and mentally fit; there was no contrary evidence.

XXII

The proper interpretation of A.R.S. 15-1471 is that the Respondent Board has discretion to determine whether applicants for retention are qualified and physically and mentally fit to perform their jobs and follow their profession. Having determined that Petitioner was fit and qualified, it was an abuse of discretion for Respondent to refuse approval of her

application and to adopt a standard of irreplaceability as the test for approval of such applications; the Respondent Court abused its discretion and erred in affirming and sustaining the decision of the Board.

XXIII

All of the evidence supported the conclusion that the Petitioner was "one of the finest teachers" to be found "anywhere." There was no contrary evidence; there was no evidence that Petitioner could be replaced by anyone of equal experience and ability.

XXIV

Even if the standard of irreplaceability were the proper test, the Respondent Board's refusal to approve Petitioner's application was arbitrary, capricious and an abuse of discretion because all of the evidence established that Petitioner was "unique" and irreplaceable by any person of equal experience and competence. There was no evidence to the contrary.

XXV

The denial of Petitioner's application for retention was unsupported by any evidence that Petitioner lacked qualification or ability to perform her job and pursue her profession; such denial was also unsupported by any evidence that Petitioner could be replaced by a teacher whose qualifications and experience even approached those of Petitioner. Respondent Board's denial of Petitioner's application for retention was therefore an abuse of discretion; the affirmance of such denial by Respondent Court was also an abuse of discretion and was error.

XXVI

Under A.R.S. 38-759, all other employees, including teachers at institutions of higher learning, of the State and its political

subdivisions are not required to retire until age 70; under subsection (i) of said statute teachers at institutions of higher education may even continue teaching past age 70. Under the same subsection, other public employees may, under some circumstances, continue to work past age 70.

Respondent School District's denial of Petitioner's application for retention forced her retirement at age 65, despite her possession of all the professional, physical and mental qualifications for continued pursuit of her profession, while all other State employees may retire at age 70. Such forced retirement deprives Petitioner of her right to pursue employment and deprives her of the opportunity to build up retirement credits under the teachers' retirement credits until the age of 70, contrary to the right which all other public employees have to pursue their profession and increase their retirement security by working until age 70. Such forced retirement deprives Petitioner of equal protection of the laws, denies her due process of law and deprives her of the privileges and immunities of citizenship, all in violation of the Constitutions of the United States and of the State of Arizona.

XXVII

Petitioner has no plain, speedy or adequate remedy except by application for extraordinary relief because:

1. The matters with which this Petition is concerned relate to Petitioner's ability to earn a living; Petitioner is presently unemployed and, at age 65, can find no new work in her profession. She is without means of supporting herself and prompt remedy by special action is therefore appropriate.

2. Petitioner has stipulated with Respondent Board that if her petition is granted she will be paid back salary for the time during which she was prevented from teaching. Any accumulation of said back salary will constitute an expenditure of public funds for which no services were received by the School District; such an expenditure should be minimized.

3. The school year 1974-75 will commence in late August of 1974; even if Petitioner is correct in her legal position, she will be unable to obtain a teaching position unless her petition is acted upon at once.

4. This petition concerns matters of public interest and of constitutional law, which by tradition are promptly adjudicated by writ such as mandamus, certiorari or prohibition, all of which have now been replaced by "special action."

WHEREFORE, Petitioner prays this Court order Respondent Honorable Richard N. Roylston to order as follows:

1. That the standard of retention adopted by Respondent School Board and applied to Petitioner is legally erroneous, in that it violates both the intent of the statute and the due process and equal protection clauses of the Constitutions of the United States and of the State of Arizona.

2. That the decision of Respondent School Board is arbitrary, capricious and an abuse of discretion.

3. That Respondent Tucson School District No. 1 rescind its denial of Petitioner's application.

4. That Respondent School Board approve and forward Petitioner's application for retention to the State Employees' Retirement Board.

5. That Respondent School Board be ordered to tender Petitioner a contract to continue teaching in her present position for the school year 1974-75.

6. That Petitioner be awarded her costs expended herein and such other and further relief as is just and proper in the premises.

RESPECTFULLY SUBMITTED this 27th day of June, 1974.

MILLER, PITT & FELDMAN, P.C.

By /s/ STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701
Attorneys for Petitioner

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANLEY G. FELDMAN, being first duly sworn, deposes and says: That he is the attorney for the Petitioner in the foregoing Petition; that he has prepared the foregoing and knows the contents thereof are true to the best of his knowledge and belief.

FURTHER your Affiant sayeth not.

/s/STANLEY G. FELDMAN

SUBSCRIBED AND SWORN TO before me this 27th day of May, 1974.

Notary Public

My Commission Expires:

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Mrs. Elizabeth Lewis, who is sixty-five years of age, is the petitioner. She has been a "continuing teacher" at Townsend Junior High School, a subdivision of Tucson School District No. 1, for fifteen successive years. She has been a teacher in active service for nearly forty years and a member of the State Employees' Retirement System pursuant to *A.R.S.* §15-1401, *et seq*. Her mental and physical fitness is not questioned, and her ability to perform successfully the responsibilities of her employment is uncontradicted.

In the school year in which she attained the age of sixty-five, petitioner properly made application to respondent School Board for renewal of her employment contract in accordance with *A.R.S.* §15-1471. The application was forwarded to respondent by her principal at Townsend Junior High School, Clarence Logan, who highly recommended that petitioner's application be approved. Though the Board has provided forms since 1954 adopting a procedure so that teachers aged sixty-five may continue to teach, respondent has summarily denied all such applications for retention. This refusal to approve applications is based on respondent's long-standing unwritten policy to deny re-employment to teachers who attain the age of sixty-five with the possible exception of those who can prove they are unique and irreplaceable. No teacher aged sixty-five has yet come within this exception to the Board's satisfaction.

At the regularly scheduled meeting of the School Board on October 26, 1972, Dr. Lee, Superintendent of Schools, recommended disapproval and petitioner's application was routinely denied by the Board. Mrs. Lewis had asked for, but was not given notice of, the meeting; nor was she given an opportunity to support her application with evidence as to her qualifications and fitness for employment. Petitioner's application was not considered on its own individual merits. Principal Logan's approval was disregarded. Petitioner was given no reason for the denial, except that one of the board members informally wrote to petitioner in explanation: "It would be unfair to hire you when all other applications have been denied."

On June 5, 1973, petitioner brought a special action attacking the Board's abuse of discretion in failing to approve her application for continued employment and challenging the Board's arbitrary and discriminatory policy of refusing employment to teachers who reach the age of sixty-five as a

denial of due process and equal protection arising under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Arizona. The court below, the Honorable Richard N. Roylston presiding, ruled that as a continuing teacher, petitioner had a right to have her application individually considered on its own particular merits and ordered respondent to so consider petitioner's application. The ruling made it unnecessary for the court below to decide the various substantive and procedural violations alleged by petitioner. Subsequent events, however, rekindled these allegations and independently provoked new constitutional issues which were brought before the same court below in petitioner's supplemental special action. These most recent events may be recited briefly.

On November 5, 1973, the Board met in closed, informal session with petitioner and her attorney. Respondent accepted oral and written evidence from petitioner concerning her qualifications to continue teaching beyond the age of sixty-five, but refused to give petitioner any indication of the policy standards against which her application would be measured. Within the time allotted and considering the absence of any employment guidelines, petitioner submitted all the evidence she could muster in her own behalf. The evidence quite clearly showed the following:

(1) Petitioner was physically and mentally fit and competent to continue teaching.

(2) Petitioner had a distinguished educational background which included over 39 years of dedicated service to her students as an employee of Tucson School District No. 1.

(3) Petitioner had received in prior years voluminous unsolicited letters of recommendation from students and parents commending her teaching abilities.

(4) Petitioner had won the respect of students, parents and teachers and had an established reputation in the community as an excellent teacher.

(5) Petitioner's principal, Clarence Logan, who evaluated petitioner's teaching abilities on June 8, 1973, in the course of his regular duties, gave petitioner an "Excellent" on her overall-rating and commented: "**Mrs. Lewis is a rarity.**"

(6) Principal Logan on or about October 22, 1972, forwarded petitioner's appeal for continued employment after age sixty-five to respondent and made the following recommendation: "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

(7) Petitioner was nominated in 1973 for the "Best Teacher in Arizona" Award.

(8) Petitioner's students have continuously won first prizes in local and state spelling and essay contests.

(9) Petitioner had made a variety of extracurricular contributions to her school as supervisor of the student's literary magazine, newspaper, creative writing and stock market clubs.

(10) Petitioner has not missed one day of school attendance in the last three years on account of health.

(11) The failure to rehire petitioner deprived students, parents and the community of a truly professional teacher.

Despite the testimony which established that petitioner is fully endowed with those teaching qualifications and characteristics of excellence which set her apart from other teachers and make her difficult to replace, on December 18, 1973, the Board again refused to approve petitioner's application. The reason given for the denial was that the termination of Mrs. Lewis' contract would not prove injurious to students nor would petitioner be difficult to replace.

The court below declined to grant petitioner the relief she requested. Petitioner comes to this court by way of special

action so that the case may be resolved before the commencement of the 1974-1975 school year.

PETITIONER'S THEORY OF THE CASE

Upon stipulation of facts to the court below, petitioner's supplemental complaint and trial memorandum set forth three primary grounds for reversing the Board's decision. First, the Board's decision to refuse employment to petitioner was a manifest abuse of discretion. In the absence of any specific written guidelines used by the Board to assess petitioner's application, the evidence she submitted concerning her qualifications, together with her principal's unqualified approval, could not fail to convince a reasonable Board that her services could not easily be duplicated and that her application merited approval and acceptance. After an individual consideration of petitioner's qualifications, the Board has no evidence to warrant overruling Principal Logan's recommendation. Respondent's failure to approve and accept petitioner's application was a patent abuse of the evidence.

Second, respondent's policy of refusing employment to teachers on the basis of their age except when they are unique or irreplaceable contravenes the legislative intention of *A.R.S.* § 15-1471. In the absence of any express standard of retention set forth in the statute, a standard of reasonableness is to be inferred. The Board's standard is obviously unreasonable and arbitrarily imposes a burden on applicants sixty-five years of age which cannot be reasonably inferred from the Teacher's Retirement Act. Furthermore, the unwritten policy adopted by respondent and applied to petitioner was so vague and illusory as to violate petitioner's right to due process of law.

Finally, the arbitrary refusal to permit petitioner to continue teaching underscores a vexing pattern of discrimination which has effectively decimated the ranks of veteran teachers whose

credentials are equally impressive, if not more impressive, than those applicants hired by the Board as replacements. In addition, respondent has deprived petitioner, who can successfully fulfill her contract, of the privilege and right to pursue public employment and her chosen profession in derogation of her privilege of citizenship as guaranteed by the Federal and State Constitutions. This discrimination and deprivation, taken together, is not justified by any educational purpose rationally related to the Board's decision. Accordingly, the Board's policy, measured against either the strict scrutiny or the rational relationship test, denied petitioner equal protection under the law.

ARGUMENT I

A. The Plain Meaning of A.R.S. § 15-1471.

Arizona has adopted a special policy towards teachers after they attain the age of sixty-five and before they reach the age of seventy. Before a teacher reaches the age of sixty-five, his contract of employment is automatically renewed for the next ensuing school year unless there is good cause for dismissal or termination. *A.R.S.* §§ Nos. 15-252 and 253. After a teacher reaches the age of seventy, he is required to retire whether or not he applies for retention of his employment. *A.R.S.* § No. 15-1471. For the teachers between the age of sixty-five and seventy, however, there is neither a statutory provision affording a teacher the right to have their contract automatically renewed nor a provision which makes sixty-five the age of compulsory retirement regardless of whether the teacher applies to be retained. The Arizona Teacher's Tenure Act and Teachers' Retirement Act thus evince a clear legislative intent that teachers between the age of sixty-five and seventy be treated differently from teachers not yet sixty-five or over seventy.

With respect to the employment of teachers who have attained the age of sixty-five but not seventy, *A.R.S.* §15-1471 provides:

> "Any teacher in active service who becomes a member of the State Employees' Retirement System pursuant to the provisions of this Article, shall be retired from service at the end of the school year following the date on which he attains the age of sixty-five, *unless his employer approves and forwards annually to the State Employees' Retirement System Board his application to be retained in his employment on a year-to-year basis."* (Emphasis supplied) (The same provision is contained in *A.R.S.* §15-1406 B).

This provision grants a teacher who has attained the age of sixty-five the statutory right to make an application for continuation of his employment. It further provides that any teacher in active service has the right to continue his employment on a year-to-year basis until he attains the age of seventy if his application for retention of employment is approved by his employer on a year-to-year basis. Once the condition of employer approval is satisfied in any given year, a teacher between the age of sixty-five and seventy may not be deprived of his statutory right to continue employment during that year.

Furthermore, *A.R.S.* §15-1471 on its face does not state a preference for forced retirement as distinguished from continued teaching. The statute plainly interpreted holds that a teacher must retire if respondent refuses to grant the approval and shall continue to teach if respondent does give its approval. The statute is silent, however, as to the standard respondent is required to use in determining whether or not to approve or disapprove applications for retention.

B. A.R.S. §15-1471 as Construed.

There are three sources which further construe *A.R.S.* §15-1471. First, A.R.S. §15-1471 is part of the *Arizona*

Thus, the Attorney General held that tenured teacher's contracts must be treated as personal service contracts. Their approval or disapproval by respondent must be made taking into consideration the individual merits and personal services that can be offered by each particular applicant.

Third, the court below, after a deliberate evaluation of *A.R.S.* §15-1471, held that the statute requires the Board to consider each application on its individual merits. The court also held that the statute makes retirement discretionary at age sixty-five and mandatory at age seventy. Furthermore, Judge

Teachers Retirement Act. A.R.S. §§15-1401, *et seq*. Arizona has taken the position that the purpose of the Teachers Retirement Act is to reward teachers for past and *future service. Montgomery v. Crawford*, 70 Ariz. 359, 220 P.2d 853 (1950) (emphasis supplied). Moreover, *Montgomery, supra*, held there was no authority under the Teachers Retirement Act for the Board to establish membership requirements for teachers joining the system that were not to be found in the Act by express words or reasonable implication.

Second, *A.R.S.* §15-1471 has been construed by *Opinion No. 56-121* of the Attorney General of Arizona. This interpretation of *A.R.S.* §15-1471 also is supported by the plain language and meaning of the statute. In construing *A.R.S.* §15-1406(b), which directly parallels and in no material way differs from *A.R.S.* §15-1471, it was concluded:

> "This section gives to each member in service the 'right' to make an application to be retained after he reaches the age of sixty-five. *This 'right' carries with it the right of each applicant to have his application individually considered on its own particular merits* by the Board of Trustees or the Board of Education of his school district before it is approved or denied. Any standard of retention that takes away this right would be violative of the legislative intent." 42 *Am.Jur.*, Public Administrative Law, §53. (Emphasis supplied.)

Roylston ruled that the legislature did not set out a standard in *A.R.S.* §15-1471 for the employer to follow in determining whether to approve continued employment past age sixty-five. Judge Roylston ruled: "In such situations the Court will infer that a standard of reasonableness is to be applied."

C. Respondent's Interpretation of A.R.S. §15-1471.

Respondent interprets *A.R.S.* §15-1471 to state a preference for forced retirement at age sixty-five. Retention is to occur only upon the approval of the employer, which is a purely discretionary matter. Furthermore, respondent says that A.R.S. §15-1471 does not require the Board to write down its standard of retention and give an applicant prior written notice of the guidelines to be used in assessing an applicant's qualifications.

However, respondent arguably did give petitioner some indication of the standard to be applied in Dr. Lee's deposition. He said that there is no formal standard, and that the decision is invariably a subjective matter; but he would not be inclined to recommend approval unless the applicant was unique or irreplaceable. He further stated that only one out of a thousand is unique or irreplaceable in his opinion.

Softening this position somewhat, the Board stated its interpretation of *A.R.S.* §15-1471 in its reason for rejecting petitioner's application: No teacher sixty-five years of age may continue teaching unless he establishes that termination of his services would prove injurious to students, or that he would be difficult to replace. Thus, it would appear an application for continued retention must show some irreparable damage to the students or that his personal services cannot easily be duplicated.

Yet, underneath this verbiage, the standard actually used by the Board is self-evident. The Board will not approve an

application unless it wants to do so or feels the need to do so. This is an illusory standard, which can be be manipulated by the Board in an unrestrained and unfettered manner to fashion the result it desires. There is nothing objective about the standard since there is absolutely no way of knowing in advance what evidence satisfies the standard. In the absence of any guidelines, the Board can retain whomever it pleases.

D. Petitioner's Interpretation of A.R.S. §15-1471.

Petitioner argues that the school board may not refuse to rehire a sixty-five-year-old teacher who is mentally and physically fit to continue teaching, who properly makes application to continue teaching, and who can successfully perform the responsibilities of her employment. The standard reasonably to be inferred from *A.R.S.* §15-1471 is one of "fitness" or "suitability" to perform the job.

A.R.S. §15-1471 makes age seventy the mandatory age for retirement in Arizona. Teachers who are sixty-five but not yet seventy are permitted by the Arizona Teachers Retirement Act to retire and receive retirement, pension and other benefits if they so desire. But they are not forbidden from continuing any further teaching. They have the option to continue teaching each year until the year of their seventieth birthday with their employer's approval. *Cf. Finch v. State Dept. of Public Welfare*, 80 Ariz. 226 295 P.2d 846 (1956).

The clear intention of the Arizona Teachers Retirement Act is to reward continuing teachers who attain the age of sixty-five by providing for their retirement if they choose to retire. But *A.R.S.* §15-1471 also expressly grants active members in service the right to continue teaching, assuming the teacher is fit and qualified to hold the job. Petitioner was a continuing teacher even before the Arizona Teachers Retirement Act was enacted. Her continuing record shows special fitness to continue her employment. No common sense interpretation of *A.R.S.*

§15-1471 requires the position that petitioner must retire and that the Board can unreasonably withhold its consent to permit petitioner to continue her employment.

Respondent takes the position that it has unrestrained power to determine who may and may not continue teaching. This is not the intent of the Teachers Retirement Act. In *Montgomery, supra,* at 70 Ariz. 359, the Supreme Court of Arizona interpreted the Act:

> "It would appear that the board is vested with broad administrative powers to be exercised in accordance with a sound discretion and with a view to effectuating the purpose of the act, and its determination within its discretionary field cannot be questioned except for a clear abuse or a clear violation of the law. *But the grant of broad administrative powers does not carry with it the right or authority to establish membership requirements that are not to be found in the statute by express words or reasonable implication."* (Emphasis supplied.)

Petitioner does not serious contend that *A.R.S.* §15-1471 is void on its face or amounts to an unauthorized delegation of legislative authority to respondent because this statute does not contain an express statement to guide the exercise of respondent's discretion.

> "Where it is impracticable to lay down a definite comprehensive rule, such as where the regulation turns upon the question of persons futures, . . . it is not essential that a specific prescribed standard be expressly stated in the legislation. *In such situations the court will infer that the standard of reasonableness is to be applied."* 1 *Am.Jur. 2d, Administrative Law,* §117. (Emphasis supplied.)
>
> "Where an ordinance in terms merely says that a certain thing shall not be done without a permit from a designated officer, it is often interpreted as meaning that the officer is to grant the permit unless, in his honest judgment reasonably exercised, the interest of the public will thereby be put in jeopardy, a construction rendering it unobjectionable on constitutional grounds." *New York ex rel. Lieberman v. Van de Carr,* 199 U.S. 552, 50 L.Ed 305, 26 S.Ct. 144; *Cities Service Oil Co. v. Marysville,* 117 Kan. 514, 231 P. 1031, 43 A.L.R. 854, error dismd 270 U.S. 665, 70 L.Ed 788, 46 S.Ct. 207; *Ex parte Broussard,* 74 Tex. Crim 333, 169 S.W. 660, error dismd 241 U.S. 693, 60 L.Ed 1215, 36 S.Ct. 285.

Petitioner does not seriously contend that *A.R.S.* §15-1471 is standard requiring petitioner to demonstrate irreparable injury is unreasonable as a matter of law. What is reasonably implied from the statute in question is that the respondent is to give his approval to the applicant, unless, in his honest judgment reasonably exercised, the applicant is unfit or unsuitable to continue teaching or that the school children would thereby be put in jeopardy. When the uncontradicted evidence shows that the applicant is qualified and can successfully perform the job, the refusal to rehire is unreasonable and arbitrary. The standards imposed by the School Board simply have no manifest relationship to the employment in question. The Board may not make use of its power as a subterfuge to avoid the Teachers Retirement Act by setting standards of retention which are so burdensome and inappropriate as to force retirement. *Cf.* Board of Education, *Tucson H.S. District No. 1 v. Williams,* 1 Ariz.App. 389, 404 p.2d 324 (1965)

The school board's interest in guaranteeing that teachers age sixty-five are fit to continue their teaching duties simply does not justify the imposition of a standard of irreparable injury. It is patently unnecessary. Respondent concedes that petitioner is mentally and physically fit to continue teaching and can satisfactorily perform her occupation as a teacher. To require more than this is simply in derogation of the standard reasonably to be imposed from the statutes in question.

II

RESPONDENT DISREGARDED THE EVIDENCE

Of all the facts submitted by petitioner both to the Board and the court below, one stands out from all the rest. As Dr. Lee admitted in his deposition, which was made part of the record by stipulation, the evaluation by Principal Logan of Mrs. Lewis' ability as a teacher "is the best evaluation and record of her performance as a teacher." Dr. Lee admitted that "Mr. Logan would know more than anyone else." *Deposition* of Dr. Lee at 31-32. Looking at Mr. Logan's evaluation it reveals that Mrs. Lewis was given the highest rating in the following areas:

(1) Cooperation.
(2) Ability to express herself.
(3) English usage.
(4) Tact and Courtesy.
(5) Punctuality.
(6) Attendance.
(7) Health and Vitality.
(8) Poise.
(9) Ability to arouse pupil interest.
(10) Affiliation with professional organizations.
(11) Lesson planning.
(12) Quality of classroom voice.
(13) Participation in community activities.
(14) Teaching techniques and skill.
(15) Control of learning situation.

She received a rating of "good" in the following areas:

(1) Personal appearance.
(2) Understanding of children.
(3) Acceptance of and willingness to profit from criticism.
(4) Parent relationships.
(5) Classroom housekeeping.
(6) Record keeping.

The only area in which she was given an "average" rating was her "attitude toward extra assignments." This is not an unreasonable rating, considering that Mrs. Lewis served four extracurricular clubs: She was editor of the student literary magazine, sole supervisor of the student newspaper, and head of the creative writing club and stock market club.

According to Principal Logan's evaluation, petitioner's overall rating was "Excellent." Finally, in response to the question, "Would you recommend for re-employment," which Principal Logan checked, he made the following comment:

> *"Mrs. Lewis is a rarity*. She controls her classes well, really teaches students, and is vital. Her students leave at the end of the year with a good knowledge of English." Plaintiff's Exhibit C, Deposition of Dr. Lee.

This evidence was not left uncorroborated. The evidence of two of Mrs. Lewis' students at trial, the voluminous evidence from former students, teachers and parents produced a clear, convincing and univocal conclusion which no reasonable person could refuse to admit -- Mrs. Lewis is a rarity. In fact, respondent Board stipulated that "The Board had no evidence to contradict the evidence offered by Mrs. Lewis in support of her physical and mental competence, and her value to her former students."

The only evidence produced by respondent was that there were numerous applications by teachers not yet sixty-five who were seeking employment by Tucson School District No. 1. Though all these teachers could obviously teach English, there was no evidence that these applicants had qualifications equally impressive as petitioner's.

It is elementary that the decision of the Board is reviewable for abuse of discretion if the decision was not based upon substantial evidence or was an arbitrary, capricious and unreasonable result. Rule 3, *Arizona Rules of Procedure for Special Actions.* Respondent produced no evidence that the loss of petitioner's services would cause less than injurious consequences to the students. Moreover, though having

considered the uncontradicted evidence presented by petitioner, the Board completely disregarded the overwhelming evidence which proved beyond any reasonable doubt that Mrs. Lewis is a teacher who cannot be ranked along with other teachers because of her truly professional ability and unlimited experience. In the face of all this, the decision of the School Board can be explained only by their adamant refusal not to permit anyone who is sixty-five years of age or older to teach. The School Board therefore abused its discretion by disregarding the overwhelming weight of the evidence, by overruling the recommendation of Principal Logan whose evaluation of petitioner is concededly the best evidence, and by reaching a result which is inconsistent with the evidence.

III

THE DENIAL OF PETITIONER'S APPLICATION VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

A.R.S. §15-1471, as interpreted by the Respondents, enables the employer to force teachers to retire at age sixty-five. Under *A.R.S.* §38-759, all other public employees may work until seventy. They cannot be forced to retire before then. *Finch v. State Department of Public Welfare*, 80 Ariz. 226, 295 P. 2d 846 (1956).

Forced retirement at age sixty-five is detrimental to petitioner and others in her class in both a pecuniary and non-pecuniary manner. First, she is deprived of her right to pursue a calling or profession, thereby to work and to sustain herself. *York v. State*, 498 P.2d 644 (Hawaii, 1972).

Secondly and more specifically, by being required to retire at age sixty-five, when no other public employees can be compelled to retire until the age of seventy, petitioner is

deprived of the opportunity to earn additional retirement credits between the ages of sixty-five and seventy and thereby further her retirement security. Such inequality of retirement between for example, a high school teacher and a teacher at a junior college, a ninth grade English teacher and a juvenile probation officer, has no constitutionally permissible basis and violates the equal protection clause. *Nelson v. Miwa*, Hawaii Circuit Court, opinion attached.

There is no rational reason to require public school teachers in Tucson School District No. 1 to retire at age sixty-five and to permit other public employees and especially teachers beyond the age of sixty-five to continue working in equally important positions: even if lines must be drawn, they may not be demarcated at a point which arbitrarily discriminates against the class of teachers of which petitioner is a member. See *Murgia v. Massachusetts Board of Retirement*, 42 U.S.L.W. 2640 (June 18, 1974) (D.C. Mass.) (copy attached).

DATED this 27th day of June, 1974.

MILLER, PITT & FELDMAN, P.C.

BY /s/ STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

In the Court of Appeals
State of Arizona
Division Two
No. 2 CA-CIV 1698

ELIZABETH M. LEWIS,
Appellant,
vs.
TUCSON SCHOOL DISTRICT NO. 1,
Appellee.

MOTION FOR REHEARING

Appellant moves this Court to rehear the issues presented by this appeal and to reconsider its opinion in this matter. Appellant takes no issue with the principles upon which the opinion of this Court is based. In essence, this Court's opinion holds persuasively that a state has a rational basis for setting different retirement ages for elementary and secondary school teachers than the retirement ages applied to other state employees. *Arguendo*, this Appellant need not argue with that holding.

However, the problem is that the issue of fundamental constitutional law which Appellant advanced in this case goes beyond a mere holding that the state may set different retirement ages for different types of employees. As Appellant indicated during oral argument, this is *not* a mandatory retirement age case; it is a retention case. It is a case questioning the validity of different standards for retention and continuance in employment after retirement age has been reached. Appellant

claims that it violates the constitutional requirement of equal protection of the law to condition the continuation of Mrs. Lewis' employment beyond the age of 65 upon proof of "irreparable injury" when other state employees only have to show "valuable service" or "special fitness" in order to obtain their employers' approval to continue working past the mandatory retirement age.

A.R.S. §15-1471 holds out the promise to all public school employees that they may continue teaching. This is a promise also held out to employees of institutions under the control of the Arizona Board of Regents. A.R.S. §39-759(I) Furthermore, a new statutory system, effective July 1, 1975, permits every other state employee to continue employment after retirement age if "specially fitted" by training to perform the duties of his position. A.R.S. §38-759.01(B)

Tucson School District No. 1, however, has adopted a standard of retention which makes it so difficult to obtain permission to continue teaching that the effect has been to deny public school teachers a right which is granted to other state employees. In sharp contrast to the standard of "valuable" service and "special fitness" applied to other state employees, Tucson School District No. 1 has interpreted the statute and given to it the meaning that retention will not be allowed unless termination of the applicant's employment would be "injurious to students" or the employee would be "difficult to replace." This Court's decision affirms that interpretation of the statute. Not only is this standard incapable of objective ascertainment, but it creates special hardships on Appellant and others in her position. The retention statute applicable to Appellant (A.R.S. §15-1471) sets no standard for retention and the standard adopted for this statute by School District No. 1 is the point in issue in this case. In other words, there being no standard for retention in the statute, Appellant concedes that she could not

complain if the same retention standard were read into the statute in question as exists for the other statutes, that is, if Appellant could be retained in her job if she were "specially fitted" or could "perform valuable service." The statute in question is unconstitutional when applied to Appellant because the standard read into it by the Appellee school district and approved by this Court treats Appellant differently from any other classification of state employee and does so without any rational basis whatsoever.

The School Board has, therefore, effectively eliminated a right which every other state employee has: the right to continue working for so long as the employee can continue to meet a reasonable standard of retention which, in the case of every other employee, is related to his ability to perform his job.

If the state of Arizona holds out to its employees the statutory promise of continued employment beyond mandatory retirement, that promise cannot be hedged about with restrictions which destroy the right. This position was convincingly reiterated by the United States Supreme Court in *Goss v. Lopez*, 43 U.S.L.W. 4181 (January 21, 1975), in which the Court held that the suspension of public school students without a hearing violated the Fourteenth Amendment. The Court founded its decision on the principle that once a statutory right is created, a state administrative agency cannot abridge that right without according the beneficiaries due process and equal protection under the law. Thus the Court stated:

> "Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Weiman v. Updegraff*, 344 U.S. 183, 191-192 (1952); *Arnett v. Kennedy*, 416 U.S. 134 (1974), 164 (Powell, J., concurring); 171 (White, J., concurring and dissenting). So may welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Morrissey v. Brewer*, 408 U.S. 471 (1972), applied the limitations of the Due Process Clause to governmental decisions to revoke parole, although a parolee has no constitutional right to that status. In like vein was *Wolff v. McDonald*, 418 U.S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution."

In the same vein, on the basis of Arizona law, Mrs. Lewis plainly had a legitimate claim of entitlement to continue teaching. Having chosen to extend the right to continue working to all state employees generally, Arizona may not restrict that right by setting a standard so different from every other standard applied to state employees as to withdraw that right or to make it impossible to continue working. *Goss, supra.*

This principle was also expressed in *Application of Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205 (1964), where the Court stated:

> "The right to practice law is neither greater nor less than the right to engage in other occupations, businesses or trades, for the right to seek *and retain* [emphasis added] employment is shared by all equally and to be equal must be upon the same conditions. It cannot be treated as a matter of grace or favor . . . ."

Thus, in the final analysis, Appellant's contention is simply that it is invidious discrimination and a violation of the equal protection clause to require her to meet a virtually impossible standard in order to be retained in her employment while all other employees who are covered by the State Retirement Fund need meet only a reasonable standard connected to their

employment. This difference is not merely academic in the case at bar since Appellant's experience and professional qualifications and accomplishments are such that she can meet any reasonable standard.

The evidence established without exception that Appellant at age 65 is one of the outstanding English teachers in the state. Thus, she is capable of rendering "valuable service" and has a "special fitness." To meet the standard adopted by Appellee, however, Appellant must prove irreparable injury to her students and irreplaceability. Such proof is beyond Appellant's power, and indeed probably beyond the power of any individual within the State Retirement Fund.

Appellee school district argues that the nature of the job requirements for elementary and secondary school teachers are different from those of other employees covered by the state retirement system and therefore might reasonably justify a difference in treatment. This may be true; but while there might be a rational basis for setting a different retirement age, there is no rational basis for setting different standards for retention, *unless* those differing standards for retention have some rational connection to job requirements. However, subsumed within the standards of "valuable service" and "special fitness" are all items of fitness and competence which each employee must show to be retained in his individual position.

The standard of "special fitness" takes into account that there may be considerable variation in the responsibilities and duties of each employee and requires each employee to demonstrate that he is "specially fitted" to continue to carry out those responsibilities. Thus, the standard of "special fitness" takes into consideration the possibility that it may be harder to be a junior high teacher than a janitor, or a truck driver, or a college professor.

Assuming that teaching elementary and secondary school children is harder than teaching juvenile offenders, juvenile delinquents, deaf and blind students, mentally retarded students, state prison inmates and the like, it is rational to suppose that the legislature might be serving a legitimate state interest by requiring the applicants for retention in the position of elementary or secondary school teachers be competent or specially fitted to perform their jobs. Here again, however, although we concede for purposes of argument that the legislature might constitutionally make that type of requirement applicable to applicants for retention in the position of secondary or elementary school teachers, the statute as interpreted does not require that sort of special showing by Appellant. It requires, as interpreted, a showing that it would be injurious to her students or that she would be difficult to replace if she were not retained. No other state employee must show that his retirement would be injurious to his employer or the people whom he serves.

There is no rational basis for setting not only a different retirement age but a different standard for retention, since all other standards used by the state and applied to other state employees could effectively serve the state's purpose in insuring its educators remain at top level of competence. The cases cited in the Court's opinion which permit earlier retirement ages for some professions or occupations do so on the theory that an arbitrary line must be drawn somewhere, and more demanding occupations require earlier review of whether the line of competence has been reached. In oral argument, Appellant admitted *arguendo* that the state had a right to set an earlier retirement age for different occupations, but argued then, and argues now, that the state does not have the right to set different standards for retention unless those standards of retention bear some reasonable relationship to the legitimate

interest of the state to insure competence in its employees. Difficulty of replacement and injury to students have no relationship to competence or special fitness, and not only require that Appellant meet a standard for retention which no other employee in the state need meet, but also require Appellant to make a showing which is a virtual impossibility.

Appellant also submits that although Appellee school district has presented an arguable basis for setting forth different retirement ages for elementary and secondary instructors in county school districts as opposed to university educators and other types of state employees who are covered by the State Retirement Fund, it has presented no rational basis by which the state could permit elementary and secondary teachers who teach in deaf and blind institutions, juvenile corrections institutions and the like, to teach for five years longer than teachers employed by county school districts. The only argument advanced by Appellee is that the duties of an elementary or secondary school educator demand more endurance, alertness and self-control than those in other professions. This makes no sense when compared to such teachers employed by institutions involving education and training of the physically or mentally handicapped, the emotionally retarded, emotionally disturbed, etc. The problems faced by elementary and secondary school teachers in such institutions are certainly as great, if not greater, than those faced in a regular public school.

We submit that when viewed in this light, the "rational basis" hinted at by Appellee and implicitly approved by this Court in its opinion, is not truly rational. Appellee has neither presented nor alluded to any other rational explanation for permitting different mandatory retirement ages or retention

standards to exist. For this reason, Appellant moves this Court to rehear her cause and reverse its earlier holding.

DATED this 13th day of February, 1975.

MILLER, PITT & FELDMAN, P.C.

/s/ STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701
Attorneys for Appellant

Copy of the foregoing mailed this 13th day of February, 1975, to:

J. William Brammer, Jr., Esquire
DeCONCINI, McDONALD & BRAMMER, P.C.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Appellee